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In the
Supreme Court of the United States

October Term, 1979

No. 79-1164

PETER LICAVOLI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION

The Opinion of the Ninth Circuit Court of Appeals, now reported in 604 F.2d 613 (1979), appears in the Appendix hereto.

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was entered on September 13, 1979. A timely petition for rehearing was denied on November 28, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Did the lower court's denial of petitioner's request for an evidentiary hearing on the methods used to execute the surveillance order violate petitioner's Fourth Amendment right to be free from "unreasonable" searches and seizures?

2. Did the lower court's failure to conduct an evidentiary hearing on the issue of what techniques of minimization, if any, were used by the government in the course of their surveillance violate the provisions of 18 U.S.C. §2518(5) and the "probable cause" requirement of the Fourth Amendment?

3. Once petitioner had made a substantial showing that statements necessary to the finding of probable cause were false and made with reckless disregard for the truth, did the trial court violate the petitioner's Fourth Amendment rights in refusing to disclose the identity of the informants who furnished the false information and in refusing to conduct an evidentiary hearing on the veracity of the wiretap applications?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 United States Code, Section 2518(5) provides:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . .

STATEMENT OF THE CASE

Petitioner was charged with receiving, concealing and/or selling a painting, the *Lucretia*, known to be stolen and having a value in excess of $5,000, while the painting was moving in interstate commerce in violation of 18 U.S.C §2315. This charge stemmed from an extensive investigative effort by the Federal Government.

In March of 1976, after investigating the petitioner's conduct for several years, the government applied to a federal district court for authorization to conduct electronic surveillance of the petitioner. Pursuant to Government Miscellaneous Application Number 364 (hereafter 364), the government was authorized to tap the telephone at the Vesuvio Art Gallery, a business owned by petitioner and located on his ranch, and to surreptitiously enter the gallery to install a "bug". Following the expiration of the initial twenty day surveillance period, the government obtained an order extending both methods of surveillance for an additional twenty days. Government Miscellaneous Application Number 367 (hereafter 367). On their face, both wiretap applications established probable cause to believe that the defendant was participating in transactions that involved stolen diamonds. However, no evidence of stolen gems was ever discovered in the government's investigation.

Prior to trial, petitioner moved to suppress evidence obtained pursuant to the surveillance orders on the ground that the government had failed to minimize the number of innocent conversations intercepted in violation of 18 U.S.C. §2518(5). The only record of surveillance in this case were five day reports submitted by the government to the court. These reports contained only a partial log of the surveilled conversations. Of the 216 telephone calls intercepted during the first fifteen days of surveillance, only forty of these calls, by the government's own estimation, concerned the investigation. The five day reports pursuant to Order 367 are even more inadequate, disclosing only that during one of the five day periods, 99 conversations were intercepted. The district court never ordered an evidentiary hearing on the minimization issue and the motion to suppress was denied.

Petitioner also moved to suppress evidence obtained from the electronic surveillance because of the unreasonableness of the government's conduct in installing, maintaining and removing the surveillance equipment. The district court denied both this motion

and the petitioner's request for an evidentiary hearing on this issue. As a final ground for suppressing the seized conversations, peitioner moved to suppress the evidence because of false statements contained in the wiretap application. In support of this motion, petitioner filed several affidavits establishing that information supplied to the FBI, specifically that the petitioner was involved in a major transaction involving stolen diamonds, was false, and that the FBI had been aware of the legitimacy of the diamond transaction. Petitioner requested an evidentiary hearing and the disclosure of the identity of the confidential informants who furnished the false information. Despite this substantial claim that the wiretap applications contained false statements necessary to the finding of probable cause made with reckless disregard for their accuracy, the court refused to conduct an evidentiary hearing. Instead, the court conducted an **ex parte** interview with one informant and read an affidavit submitted by another informant. The district court refused to disclose the informants' identity and denied petitioner's motion to suppress. To summarize, before the trial had begun, the trial court's rulings had denied petitioner an evidentiary hearing on the veracity of statements contained in the wiretap applications, and had precluded petitioner from discovering the reasonableness of the government's entry to install the listening devices, the techniques of minimization, if any, that were used by the surveilling agents, and the identity of the informants who had supplied false information.

At trial, one of petitioner's defenses was the fact that the painting was not stolen. Until March 3, 1979, the *Lucretia* was owned by Charna Signer of Cincinnati. On that date, Mrs. Signer's home was allegedly burglarized. Petitioner contended that the painting had never been stolen, but that Charna Signer, with the cooperation of her son, Burt, her daughter-in-law and some of her grandchildren had engaged in a plan to defraud her insurance company. In support of this theory, it was established that in May of 1975, two months after the alleged burglary, Bruce Signer, Charna Signer's grandson, arranged with Bekins Movers to have the painting shipped to Tucson. A friend of the Signer grandchildren testified that he saw the painting in the home of one of the grandchildren in October or November, 1975. Petitioner sought to call Bruce, Craig, Arlene and Burt Signer to the witness stand. However, during voir dire examination, out of the presence of the jury, each of these witnesses stated that they would invoke their Fifth Amendment right against self-incrimination if they were called to testify. The trial court then ruled that petitioner would not be permitted to call these witnesses

to the stand to invoke their privilege in front of the jury. A second defense advanced at trail was that the painting, which had been *stolen* in March, 1975, and which had arrived in Arizona in May of 1975, was no longer in interstate commerce when it was offered and sold to the petitioner in April of 1976. The trial court held that this was a question for the jury.

The jury convicted petitioner of receiving stolen goods in violation of 18 U.S.C. §2315, and he was sentenced to eighteen months imprisonment and a $10,000 fine. The 77 year old petitioner has been out of custody pending the final disposition of this appeal. On September 13, 1979, the Ninth Circuit Court of Appeals affirmed his conviction. A timely motion for rehearing was denied on November 28, 1979.

ARGUMENT I

The lower court's denial of petitioner's request for an evidentiary hearing on the method by which the government covertly entered the petitioner's ranch to install surveillance equipment conflicts with longstanding precepts of Fourth Amendment law and creates a dangerous precedent whereby law enforcement's necessarily surreptitious conduct will not be subject to judicial review.

In March of 1976, a federal judge authorized agents of the Federal Bureau of Investigation to install electronic listening devices in the office of an art gallery owned by the petitioner. Following the expiration of this initial authorization on April 6, 1976, an extension order was obtained permitting the government to continue the surveillance for an additional twenty days. Both the original wiretap order and the extension order contemplated numerous covert entries onto the petitioner's property by law enforcement agents. Eg. 364 Order at page 5 and 367 Order at page 5 authorize secret entries "for the purpose of installing, maintaining and removing" electronic surveilance equipment. The business office that was *bugged* was located in the middle of the petitioner's ranch. The method used to gain entry into the office, the number and duration of secret entries, the method of installing the listening devices, the number of agents who surreptitiously entered the office, and the conduct of the law enforcement agents during the installation of the surveillance equipment are all unknown to the petitioner.

On November 11, 1976, prior to the trial below, petitioner's counsel moved for an evidentiary hearing "to determine if the surreptitious entry. . .was. . .carried out with the minimum intrusion possible (into his) right of privacy." See Opinion, Appendix page v;

Record on Appeal to the Ninth Circuit hereafter referred to as R.A. at page 308. The hearing was requested in order to determine whether the execution of the wiretap orders had been reasonable pursuant to the requirements of the Fourth Amendment. **Dalia v. United States**, 441 U.S. 238, 258 (1979). The trial court denied the motion on December 3, 1976. Agent Louis George, the agent in charge of installing the surveillance equipment, was called by the government to testify during the petitioner's trial on the 7th and 8th of December.

On appeal, the Ninth Circuit upheld the trial court's denial of petitioner's request for an evidentiary hearing. Citing no supporting authority for its decision, the Court of Appeals held that an evidentiary hearing was not required because: (1) petitioner had ample opportunity to inquire into the matter at trial; and (2) the petitioner pointed to no circumstances indicating that the surreptitious installation of the surveillance equipment was unreasonable. See Opinion, Appendix page v-vi.

The Ninth Circuit's opinion in this case creates a dangerous precedent that would permit government agents to secretly install listening devices in buildings without ever have their actions reviewed by the courts. The Ninth Circuit's reasoning that an evidentiary hearing was not required because peitioner had ample opportunity to inquire into the matter at trial is unsupported by the undisputed facts in the record and defies common sense. Surely, once the trial court denied the petitioner's request for an evidentiary hearing on the method used by the government to secretly enter petitioner's office and install listening devices, petitioner was precluded from inquiring into the issue. Since this issue had no relevance whatsoever to any of the proceedings at trial, petitioner was unable to examine Agent George regarding the government's covert entries into petitioner's office when the agent was called to testify at trial. In accordance with Rule 611 of the Federal Rules of Evidence, petitioner's cross-examination of Agent George was limited by the trial court to those matters raised in the government's direct examination of the officer. Trial transcript hereafter referred to as T.R. at page 246-248. In fact, on the sole occasion that defense counsel asked a question concerning the method of installing the surveillance equipment, the government successfully objected to the question on relevancy grounds. T.R., p. 239.

The second reason given for the Ninth Circuit's affirmation of the lower court's ruling was that petitioner pointed to no circumstances that would indicate that the manner of installation was unreasonable. Not only is this reasoning circular, but it also

establishes the novel and frightening precedent that a defendant must make a showing of unreasonableness before he can challenge the government's secret conduct. By its very nature the installation of electronic surveillance equipment is conducted surreptitiously, and the government has exclusive possession of all information regarding their method of entry, the frequency and duration of their entries, the installation procedure, and the agents' conduct during the installation, maintenance or removal of the listening devices. The danger to the petitioner and to all defendants as a result of the Ninth Circuit's opinion is readily apparent. If a defendant must allege specific instances of government misconduct before he is entitled to a hearing on the government's secret entries to install surveillance equipment, there will rarely, if ever, be a defendant who will qualify for such a hearing.

Petitioner is entitled to the Fourth Amendment's protection against unreasonable searches and seizures. Prior to this Court's decision in **Dalia v. United States**, 441 U.S. 238 (1979), many courts required that the method of installing the listening devices be approved by the court prior to the execution of a wiretap order. **Dalia v. United States**, 441 U.S. at 241 n.3. This Court in **Dalia** recognized that this was the "preferable" approach to be followed. 441 U.S. at 259 n.22. In fact, this Court held that pre-execution approval was not always required only because "the manner in which a warrant is executed is **subject to later judicial review as to reasonableness**." 441 U.S. at 258 (emphasis added). See **Ker v. California**, 374 U.S. 23, 33 (1963); **Marron v. United States**, 275, U.S. 192, 195-96 (1927).

The Ninth Circuit's decision in this case deprives the petitioner and future defendants of the protection of this judicial review as to reasonableness. Petitioner cannot know whether the government's secret entry was unreasonable due to the number or duration of entries. **Dalia v. United States**, 441 U.S. at 258 n.20. Petitioner cannot know if the government's surreptitious activity was unreasonable because of conduct going beyond the limited permissible scope of their entry in order to discover investigative leads. See **United States v. London**, 424 F. Supp. 556, 560 (D.Md.) aff'd 556 F.2d 709 (4th Cir. 1976); Covert Entry in Electronic Surveillance: The Fourth Amendment Requisite, 47 Fordham L. Rev. 203, 207-08 (1978). In all candor, petitioner can hardly believe that after spending so may years trying to build a case against petitioner, Agent George would then be motivated to limit his intrusion into petitioner's office.

This case present a compelling constitutional question that

should be resolved by this Court. Neither the Ninth Circuit nor the government has cited any judicial opinion denying a defendant the right to a hearing on the government's execution of a wiretap order. See eg. **Dalia v. United States**, 441 U.S. 238, 245 (1979). (Lower court did conduct an evidentiary hearing); **United States v. Scafidi**, 564 F.2d 633, 640 (2nd Cir. 1977); **United States v. London**, 424 F.Supp. 556, 560 (D.Md.), aff'd 556 F.2d 709 (4th Cir. 1976). The inherent secrecy surrounding the installation of surveillance devices, and the grave potential for abuse by the law enforcement agents engaged in this covert activity require that a defendant be permitted an evidentiary hearing without having to allege specific instances of government improprieties. By requiring a showing of unreasonable government action in what is necessarily surreptitious conduct by the government, the Ninth Circuit's opinion serves only to deny petitioner and other defendants the sole means of insuring that their Fourth Amendment rights have been honored. The thought of police acting secretly without ever having to be held accountable for their actions is both foreign to our system of justice and extremely frightening. For these reasons, petitioner urges this Court to grant this Petition for Writ of Certiorari.

ARGUMENT II

The Ninth Circuit's holding that an evidentiary hearing was not required on the government's failure to minimize the interception of "nonpertinent" telephone calls is in direct conflict with the opinions of other circuits and renders a defendant unable to determine whether the government has complied with the minimization requirement of 18 U.S.C. §2518(5).

Prior to trial, petitioner moved to suppress the fruits of the electronic surveillance on the ground that the government had violated the provisions of 18 U.S.C. §2518(5) which require the government to conduct its surveillance "in such a way as to minimize the interception" of communications irrelevant to the investigation. Although the motion to suppress did not expressly include a request for an evidentiary hearing, the failure to request a hearing is not the yardstick for measuring whether an evidentiary hearing is required. Eg. **United States v. Bynum**, 475 F.2d 832 (2nd Cir. 1976). As the Ninth Circuit correctly noted in its opinion, the test is whether sufficiently definite allegations have been raised in the suppression motion.

> "An evidentiary hearing on a motion to suppress is required if the moving papers are sufficiently definite, specific, detailed and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are required. . **United States v. Losing**, 539 F.2d 1174, 1177 (8th Cir. 1976). . .A hearing is not required if the grounds for suppression consist solely of conclusory allegations of illegality. Id. "at 1178." See Opinion, Appendix at page viii. (Citation omitted).

The Ninth Circuit then upheld the lower court's refusal to hold an evidentiary hearing stating:

> "Licavoli's motion to suppress alleges failure to minimize only in general and conclusory terms; he makes no specific allegations raising contested issues of fact."

The Ninth Circuit opinion stands in direct conflict with the Eighth Circuit's opinion in **United States v. Losing**, **supra**, upon which they rely. While the **Losing** court did apply the same test referred to by the court below, the opposite conclusion was reached by the Eighth Circuit in that case. In **Losing**, the sole allegation contained in the defendant's motion to suppress was as follows:

> "8. The agents conducting the surveillance failed to minimize the interception of communications not subject to interception and failed to record all communications which were monitored or overheard."
> 539 F.2d 1174, 1178 n. 5.

The Eighth Circuit Court of Appeals recognized the lack of specificity of these allegations but nonetheless held them sufficient to require an evidentiary hearing because "the government, at least in the beginning, was in exclusive possession of the information by which the allegations could have been made more specific." 539 F.2d at 1180.

It is this exclusive knowledge of the pertinent facts which has consistently led other federal courts to place the initial burden of establishing a **prima facie** showing of compliance with the minimization statute on the government. **United States v. Rizzo**, 491 F.2d 215, 217 n. 2 (2nd Cir. 1974). (The burden of proof on the minimization issue. . .necessarily rests, in the first instance, on the government. The United States Attorney must be prepared to sustain that burden even in a case where the defendant is unprepared or chooses not to present its own evidence on the issue.) Accord: **United States v. Quintana**, 508 F.2d 867, 875 (8th Cir. 1975); **United States v. Armocida**, 515 F.2d 29, 45 (3rd Cir. 1975). The Ninth Circuit's opinion conflicts with these decisions by

requiring the defendant to make some showing of a failure to minimize before the government need respond to the allegation.

In addition, this Court should note that specific allegations were made by petitioner. Petitioner alleged that government agents made no attempt to categorize innocent calls separate from calls subject to seizure under the wiretap order. R.A. p. 185, **Scott v. United States**, 436 U.S. 128, 141 (1978); **United States v. Hyde**, 547 F.2d 856, 870 (5th Cir. 1978). ("Once the monitoring agents have sufficient data to conclude that a particular type of conversation is unrelated to the criminal investigation; the minimization requirement obliges them to avoid intercepting future conversation as soon as they can determine that it falls within that category.") The fact that the government began their surveillance in order to overhear communications concerning stolen gems, but wound up listening to conversations about works of art also raises doubts about the government's method of minimization, when, as here, the surveillance equipment was installed in an art gallery and, presumably, most of the telephone calls concerned art, and not jewels. Although these are more substantial allegations than those raised in **Losing**, petitioner concedes that he has been unable to make more definite claims. However, it seems nearly impossible that any defendant could ever make more specific claims since the government has exclusive possession of information concerning their minimization techniques.

Finally, the Ninth Circuit attempts to bolster their opinion by stating that the district court "closely supervised electronic surveillance", and that "the FBI undertook, in good faith and with adequate success, the minimization of interceptions". Opinion, Appendix page viii. Such reasoning here is flawed for several reasons. First, the good faith of law enforcement officials is irrelevant to the issue of minimization. **Scott v. United States**, 436 U.S. 128, 139 n. 13 (1978). The proper method for determining minimization is to objectively analyze the nature of the intercepted conversations. **Scott v. United States, supra**. This latter method was not utilized in this case.

As to the allegations that the district court closely supervised the surveillance, this is simply unsupported by the evidence. The FBI reports made to the court contained only **partial** logs of the intercepted phone calls. Although the reports have never been disclosed to the petitioner, it has been established that during at least the first fifteen days of the wiretap, the government intercepted an increasing number of innocent phone calls, and that during this time between 75 and 81 per cent of the telephone calls intercepted

were in no way related to the government's investigation. This high percentage of innocent calls intercepted is some indication of the government's failure to comply with the minimization requirement. **Scott v. United States**, 436 U.S. 128, 140 (1978); **United States v. Armocida**, 515 F.2d 29, 43 (3rd Cir. 1975). The reports also indicate that the tape machine was turned off only after business hours had ended, presumably when no one would be in the office to use the phone. Significantly, there has never been a finding by any court that this conduct by the government was sufficient to establish a **prima facie** showing of compliance with the minimization statute.

This significant conflict between the Ninth Circuit and other federal courts must be resolved by this Court in order to firmly establish the specificity of allegations necessary to obtain an evidentiary hearing on the issue of minimization. In the Eighth Circuit, bald and speculative allegations are sufficient because of that court's awareness that the government is in exclusive possession of information concerning what, if any, minimization techniques were used. However, in the Ninth Circuit, even specific factual allegation are insufficient to require a hearing. This is an unfair burden on a defendant. How can he make explicit factual claims if both the court and government refuse to disclose those facts necessary to construct such a claim? The Ninth Circuit's opinion presents nearly insurmountable obstacles to any defendant's effort to discover whether he has been afforded his protection from unlawful government intrusions pursuant to both the Fourth Amendment and 18 U.S.C. §2518(5). Without an evidentiary hearing, petitioner is stripped of the only means of ensuring that the agents complied with both the requirement of 18 U.S.C. §2518(5) "that the agents conduct the surveillance in such a manner as to minimize the interceptions" and the Fourth Amendment's requirement that searches not be unreasonable. **Scott v. United States**, 436 U.S. 128, 137, 140 (1978). The government can eavesdrop on obviously innocent phone calls with the slim hope that they may somehow obtain an investigative lead. Such conduct runs contrary to the Fourth Amendment's requirement that seizures be based on probable cause, a requirement that must be even more scrupulously honored when the seizure concerns conversations protected by the First Amendment. For these reasons, petitioner urges this Court to grant this Petition for Writ of Certiorari.

ARGUMENT III

Following the submission of affidavits alleging the existence of false statements contained in the wiretap applications necessary to

the finding of probable cause and which were made with reckless disregard for the truth, the lower court's holding that neither an evidentiary hearing on the veracity of the wiretap applications nor the disclosure of the informants' identity was required violated petitioner's Fourth Amendment rights.

Recently, in **Franks v. Delaware**, 438 U.S. 154 (1978), this Court held that a defendant is entitled to an evidentiary hearing on the accurancy of a search warrant affidavit when he alleges that a false statement necessary to the finding of probable cause knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. The issue of whether the informant's identity must be disclosed following an initial showing of false statements by the informant has never been resolved by this Court. In the instant case, the district court's refusal to conduct an evidentiary hearing or to disclose the identity of the informants violated petitioner's right to determine whether the wiretap orders complied with the probable cause requirement of the Fourth Amendment.

In both wiretap applications, No. 364 and No. 367, Agent George relied heavily upon information that he received from two informers, Informer No. 1 and Informer No. 3. Both of these informants allegedly told George that petitioner was involved in the sale and distribution of stolen jewelry. The major transaction described by both informants involved the sale of diamonds arriving in Arizona from Florida via Oklahoma. Both informants expressed their belief that the diamonds were stolen. Informer No. 3 allegedly advised George that petitioner was negotiating with M.H. Maxwell of Florida for the sale of the gems. While both applications for wiretaps rely on this gem transaction, the latter application, No. 367, relies almost exclusively on this transaction. See affidavit in support of wiretap No. 367 attached to the Appendix, see Appendix at page xxxii. The establishment of probable cause hinges on the representations made by these informants.

Prior to trial, on October 8, 1976, in a motion to suppress, petitioner submitted several affidavits which demonstrated that the diamonds referred to in the wiretap applications were not stolen. In fact, these documents revealed that the participants to the diamond transaction had received assurance from the Federal Bureau of Investigation (FBI) in Oklahoma that the gems were not stolen. When discussions were held between the various parties to the proposed diamond sale, petitioner demanded and received assurances that the diamonds were not stolen. The lawfulness of the transaction is further demonstrated by the fact that petitioner was

never charged with receiving stolen diamonds.

The motion based on these affidavits requested an evidentiary hearing on the veracity of the wiretap application and the disclosure of the identity of the confidential informants. However, instead of conducting an evidentiary hearing, the Court conducted an **in camera** interview with Informer No. 1 and required the prosecutor to submit an affidavit from Informer No. 3. The court then refused to disclose the identities of the informants and denied the motion to suppress. The Honorable Judge Burns, in his denial of petitioner's motion for an evidentiary hearing, noted that the defendant had not established "an intentional or material government misrepresentation (and that the) allegedly misleading statements on which he most strongly relies in his memo (are) those involving fences, cement and shella . . .".[1] T.R. p. 514. Apparently, the trial court believed that petitioner's representations as to statements regarding cement were the heart of his pretrial motion and not the numerous affidavits that demonstrated the falsity of statements in the wiretap applications. The trial court's requirement that the falsehoods be "intentional" stands in direct contrast with this court's holding in **Franks v. Delaware**, 438 U.S. 154 (1978) which requires only that the false statements be made with a reckless disregard for their veracity before a defendant is entitled to an evidentiary hearing. On appeal, the Ninth Circuit curtly affirmed the denial of the motion for an evidentiary hearing, reasoning that "no showing of misrepresentation justifying a full evidentiary hearing had been made." Opinion, Appendix page ix.

Although the issue of the disclosure of the informants' identity was raised at trial, in petitioner's brief to the Ninth Circuit, and in the petition for rehearing, the Court of Appeals never addressed the issue in their opinion.

A

The denial of petitioner's request for an evidentiary hearing following the submission of affidavits alleging false statements made by Agent George with reckless disregard for the veracity of the statements stands in direct conflict with this Court's opinion in Franks v. Delaware.

In **Franks v. Delaware**, 438 U.S. 154 (1978), this Court declared in unequivocal terms that a defendant is entitled to an evidentiary hearing on the veracity of an affidavit used to establish probable

[1]In another motion filed by petitioner, it was contended that the wiretap applications did not establish probable cause because of the government's misconstruction of innocent conversations concerning cement and fences.

cause whenever a preliminary showing is made that false statements in the affidavit necessary to the finding of probable cause were deliberately falsified or made with reckless disregard for the truth. Specifically, this Court stated:

> "To mandate an evidentiary hearing. . .(t)here must be allegations of deliberate falsehood or reckless disregard for the truth, and these allegations must be accompanied by an offer of proof. They must point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements should be furnished. . .Finally, **if these requirements are met**, and if when materials that is the subject of the alleged falsity or reckless disregard is set to one side. . .(and) the remaining content is insufficient (to support a finding of probable cause), **the defendant is entitled under the Fourth and Fourteenth Amendments to his hearing.**"
> 438 U.S. at 171-72. (Emphasis added).

The rationale behind the **Franks** decision has been made clear by this Court: If a defendant is never able to challenge the truthfulness of an officer's application for a search warrant or a wiretap, it could "denude the probable cause requirement (of the Fourth Amendment) of all real meaning." 438 U.S. at 168. A ban on challenges to the veracity of an affidavit would permit the police to exaggerate or expand facts given to a magistrate merely for the purpose of meeting the probable cause requirement confident that such a ploy would be worthwhile.

In the instant case, the defendant fully complied with the requirements set forth in **Franks**. Affidavits alleging specific false statements in the application for electronic surveillance were submitted to the court. As it turned out, the statements contained in the wiretap application were false; the Maxwell diamonds were not stolen. Petitioner's affidavits alleged not only that the diamonds referred to in the wiretap application were not stolen, but also that the statements regarding the diamonds were made with reckless disregard for their veracity. Even if misrepresentations regarding petitioner's involvement with stolen diamonds were not deliberate, Agent George undeniably made these statements with reckless disregard for their truth. Wherever Agent George got his information from, it is clear that he neglected to consult any of the participants to the diamond transaction. These participants had no

reluctance to discuss the matter as was evidenced by the affidavits that were submitted to the district court. Moreover, Agent George failed to consult his own employer, the FBI, whose Oklahoma office had previously assured participants to the diamond transaction that the gems were not stolen.

Despite these substantial allegations, the trial court refused to conduct an evidentiary hearing. Instead, an **in camera** interview was conducted with Informer No. 1 and an affidavit was submitted from Informer No. 3. This **ex parte** proceeding was not an adequate substitute for an evidentiary hearing. Indeed, it is the government's **ex parte** application for a wiretap that underlies this argument. The Ninth Circuit has disregarded the **Franks** decision and has decided that even if an defendant submits affidavits alleging false statements necessary to the finding of probable cause made with reckless disregard for their accuracy, he is still not entitled to an evidentiary hearing. The petitioner was thus denied his opportunity to fully develop the allegations set forth in his affidavit.

The requirement that an affidavit for a search warrant set forth sufficient facts to establish probable cause assumes that the affidavit sets forth **true** facts. **Franks v. Delaware**, 438 U.S. 154, 164-65 (1978). The petitioner is entitled to know that the wiretap orders in this case were based on a finding that there actually was probable cause, and not on knowing misrepresentations made by the government. This Court's holding in **Franks** that following specific detailed allegations of materially false statements made with reckless disregard for their veracity, a defendant must be permitted an evidentiary hearing is emasculated by the Ninth Circuit's holding. Anything less than a full evidentiary hearing erodes the probable cause requirement and gives government officials assurance that any misrepresentations that have been exposed by a defendant can be covered up in a subsequent **ex parte** hearing. For these reasons, petitioner urges this Court to grant this Petition for Writ of Certiorari and vacate the opinion below.

B

This Court must resolve the difficult question of whether the identity of an informant must be disclosed once there has been a substantial showing that statements attributed to the informant and necessary to the finding of probable cause are false.

In **Roviaro v. United States**, 353 U.S. 53 (1957), this Court held that an informant's identity must be disclosed when, on balance, the defendant's need for disclosure in order to prepare his defense outweights the public's interest in encouraging informers to assist

law enforcement. Then years later, in **McCray v. Illinois**, 386 U.S. 300 (1967), the Court again balanced the competing interests involved and held "that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand where there was ample evidence in the probable cause hearing to show that the informant was reliable and credible." **Franks v. Delaware**, 438 U.S. 154, 170 (1978).

Since **McCray**, there has been a great deal of confusion as to whether disclosure of an informant is ever constitutionally required when probable cause, rather than guilt or innocence, is in issue. **Mapp v. Warden, N.Y. State Correctional Institute**, 531 F.2d 1167, 1173 (2nd Cir. 1977) ("(W)here the issue is one of probable cause disclosure of the identity of an informer is not **constitutionally** required. . ."). Accord: **United States v. Bolton**, 458 F.2d 377, 378 n.5 (9th Cir. 1972); **United States v. Santorpio**, 560 F.2d 448, 453 (1st Cir. 1977) (disclosure is constitutionally required when there is a challenge to the informer's reliability or credibility); **United States v. Abramson**, 553 F.2d 1164 (8th Cir. 1977) (lesser standard for disclosure applies if the informer's information led to a warrantless search as opposed to search pursuant to a warrant). See **McCray v. Illinois**, 386 U.S. 300, 311-12 n.11 (1967). In fact, this Court has recognized that the issue of whether an informant's identity must be disclosed following a preliminary showing of false representations in an affidavit for a search warrant is a "difficult question." **Franks v. Delaware**, 438 U.S. 154, 179 (1978).

In cases where disclosure of an informant is necessary, courts have taken varied approaches as to the proper method of disclosure. In **People v. Darden**, 34 N.Y.2d 177, 313 N.E.2d 49 (1974), the court held that disclosure should be to the court **in camera**, but that the defendant should be able to submit written questions for the judge to ask the informant. The Minnesota Supreme Court has left it to the trial court to determine whether **in camera** or open court disclosure is required. **State v. Luciow**, 240 N.W.2d 833 (1976). In the instant case, the trial court conducted an **in camera** interview with one informant but did nothing more than examine an affidavit from another. Defense counsel was never allowed to be present or to submit questions to either of the informants.

The state of confusion that exists in the law can only be reconciled by this Court. If an informant's identity is not required to be disclosed once a defendant makes a preliminary showing that his information was false, the Fourth Amendment's requirement that

searches be based on probable cause will be greatly eroded. Law enforcement agents will be unconcerned about the reliability of an informant's testimony because a defendant will never be able to challenge the informant. Previously, this Court has indicated only that disclosure of an informant is not required when the reliability of an informant is undisputed. **McCray v. Illinois, supra**. In the instant case, a substantial claim has been made that the informants furnished unreliable information. This claim has been supported by several affidavits from persons in a position to know the truth or falsity of the informants' information. Petitioner can do no more. This Court must allow the defendant some form of meaningful disclosure of the informants' identities. In order to preserve the vitality of the probable cause requirement, petitioner urges this Court to grant this Petition for Writ of Certiorari and reverse the lower court's denial of the defendant's motion for disclosure of the confidential informants.

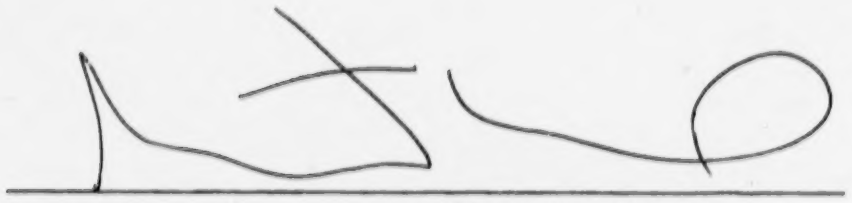
CONCLUSION

This case presents compelling questions as to the extent to which the government's covert surveillance operations may remain secret and undisclosed. After years of investigation, the government finally established probable cause to believe the petitioner was involved in the sale of stolen diamonds. However, the factual statements furnished by informants and used to establish probable cause were alleged to be false and the government was never able to establish that the petitioner was in any way involved in the sale of stolen diamonds. Despite these facts, the identity of these informants remains secret. Similarly, the manner in which the wiretap order was executed remains secret. The government secretly seized conversations for forty days and the petitioner has never been allowed to know how the seizure was done. Finally, petitioner has been left in the dark as to whether there was ever any effort made to minimize the seizure of innocent conversations. He does not know if the government ever stopped listening to his conversations when they concerned his most private and personal thoughts.

Unless review is granted by this Court, the opinion of the Ninth Circuit will stand as a precedent for permitting the government to conduct lengthy, covert operations without ever having to be held accountable to the courts or the citizenry for its actions. The safeguards that Congress built into Title III in order to protect the public will have been seriously eroded.

For all of these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 27th day of December, 1979.



ROBERT J. HIRSH
Hirsh & Bayles, P.C.
Counsel for Petitioner

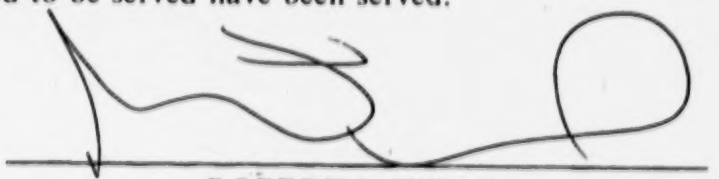
CERTIFICATE OF SERVICE

ROBERT J. HIRSH, being first duly sworn upon his oath deposes and says, that on this 27th day of December, 1979, he caused a copy of the foregoing Petition for Writ of Certiorari to be deposited in the United States mail, first class postage prepaid, addressed to the following:

Mr. Daniel Knauss
Assistant U.S. Attorney
120 West Broadway
Tucson, Arizona 85701

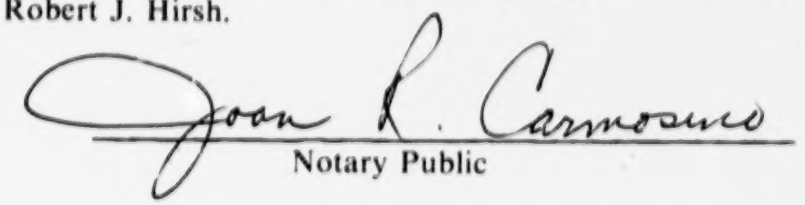
Mr. Kevin O'Malley
Special Attorney
U.S. Department of Justice
Room 2307
300 North Los Angeles Street
Los Angeles, California 90012

who are counsel for the State of Arizona. I further certify that all parties required to be served have been served.



ROBERT J. HIRSH

Subscribed and sworn to before me this 27th day of December, 1979 by Robert J. Hirsh.



Notary Public

My Commission Expires: 7-18-82

APPENDICES

1. Slip Opinion of the Ninth Circuit Court of Appeals, now reported in 604 F.2d 613 (1979).
2. Government Miscellaneous Application Number 367.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER LICAVOLI, SR.,
Defendant-Appellant

OPINION

Appeal from the United States District Court
For the Tucson District of Arizona

Before: WRIGHT and HUG, Circuit Judges, and INGRAM*, District Judge

HUG, Circuit Judge:

Peter Licavoli, Sr. appeals his conviction for receiving stolen goods in violation of 18 U.S.C. §2315. Licavoli contends that the district court should have suppressed evidence obtained through the use of electronic surveillance devices. He also argues that the court committed reversible error in several trial rulings concerning the admissibility or sufficiency of evidence and in other aspects of the conduct of the trial. We affirm the conviction.

I.

The Investigation and Trial

In March 1976, a federal judge authorized agents of the Federal Bureau of Investigation to install electronic surveillance devices in the office of an art gallery owned and operated by Licavoli. The F.B.I. had presented evidence to the court tending to show that the surveillance was necessary to their investigation of allegations that Licavoli was acting as a broker in several transactions involving stolen diamonds. A finding of probable cause that Licavoli was dealing in stolen diamonds was supported by an affidavit prepared and submitted to the court by the F.B.I.; the substance of the affidavit was based on information obtained by the F.B.I. from two confidential informants whose identities have remained undisclosed. Pursuant to the authorization order, F.B.I. agents installed a wiretap on Licavoli's office phone and placed an

*Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

electronic listening device within the office to intercept room conversations.

The initial authorization order was issued on March 18, 1976, and expired by its terms at the end of twenty days from that date. The F.B.I. terminated electronic surveillance under the initial order on April 6 and applied for an extension order. On April 9, the authorizing judge issued an order extending his authorization of electronic surveillance for an additional twenty days.

In April 1976, Donald Mason, an undercover agent for the F.B.I., engaged in a series of negotiations with Licavoli for the purchase of diamonds believed by the F.B.I. to be stolen property. In a telephone conversation during this period, Licavoli informed Mason that he had acquired a valuable painting, the *Lucretia*, that he wished to sell.[1] At a meeting in Licavoli's gallery office, Licavoli showed to Mason two newspaper articles that clearly stated that the *Lucretia* has been stolen almost a year earlier from the home of its owner, Charna Signer, in Ohio. With the aid of the electronic listening device planted in Licavoli's office, the F.B.I. recorded two room conversations, one involving Licavoli and his daughter and the other involving Licavoli and an associate, Ron Walker, that tended to show that Licavoli had notice of the theft of the *Lucretia*. Mason subsequently told Licavoli that he had found a buyer for the painting and paid Licavoli $500 as a down payment. Shortly thereafter, a search warrant was issued, and federal agents seized the *Lucretia* from Licavoli's art gallery.

On the basis of Licavoli's involvement with the *Lucretia*, a federal grand jury indicted Licavoli on a charge of knowingly receiving stolen property valued in excess of $5,000 and constituting a part of interstate commerce, in violation of 18 U.S.C. §2315. No charges were brought on Licavoli's dealings with allegedly stolen diamonds.

At trial, Licavoli presented three major defenses: (1) the *Lucretia* was not stolen; rather, it was the object of a conspiracy by Charna Signer and others to defraud the insurer of the painting; (2) the *Lucretia* is not valued in excess of $5,000; and (3) the painting had come to rest in Arizona and therefore was not a part of interstate commerce. The jury rejected Licavoli's defenses and returned a verdict of guilty. Licavoli was sentenced to a prison term of eighteen months and fined $10,000.

II.

Issues Presented for Review

With respect to Licavoli's contention that the fruits of electronic surveillance should have been suppressed, the following issues are raised:

1. Are the orders authorizing electronic surveillance facially invalid because they authorized the F.B.I. to enter Licavoli's office surreptitiously to install, maintain and remove electronic surveillance devices?

2. Did the trial court err in failing to grant an evidentiary hearing concerning the reasonableness of the surreptitious entry?

3. Do the authorization orders inadequately specify the suspected criminal conduct to which the intercepted conversations are expected to relate?

4. Did the trial court err in failing to order, on its own motion, an evidentiary hearing on the question of the adequacy of the minimization of electronic surveillance?

5. Was Licavoli entitled to an evidentiary hearing on his allegation that a Government affidavit supporting the F.B.I.'s application for the authorization orders contained material misrepresentations?

With respect to the conduct of the trial, the following issues are raised:

1. Did the Government fail to establish a proper foundation for the admission into evidence of an expert appraisal of the value of the *Lucretia*?

2. Did the trial court commit plain error in admitting into evidence testimony of Licavoli's collateral misconduct relating to his dealings with allegedly stolen diamonds?

3. Did Walker retain his privilege against self-incrimination at trial even though he had testified to relevant matter before the grand jury?

4. Did the trial court err in refusing to allow Licavoli to call as witnesses persons who would have invoked their privilege against self-incrimination and refused to testify?

5. Is the evidence insufficient to support a finding that the *Lucretia* was part of interstate commerce when Licavoli received the painting?

III.

Suppression of the Fruits of Electronic Surveillance

We first turn to Licavoli's contentions that the F.B.I. engaged in illegal electronic surveillance of his gallery office, and that the evidence derived from the surveillance should have been suppressed. We are concerned here with the requirements of both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

Title 18 U.S.C. § 2515 prohibits the receipt into evidence of the contents of a communication, or evidence derived therefrom, if the disclosure would be in violation of Title III. The grounds on which a motion to suppress may be brought are set forth in § 2518(10)(a). At the time of Licavoli's trial, that section provided in part:

> Any aggrieved person. . .may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the ground that—
> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
> (iii) the interception was not made in conformity with the order of authorization or approval.

Section 2518 (1)-(8) sets forth the procedures that must be followed and the requirements that must be met to obtain a valid authorization order for electronic surveillance and to engage in the lawful interception of communications.

Over the objections of the defense, the Government introduced at trial recordings of the two intercepted conversations that tended to show that Licavoli knew that the *Lucretia* was stolen. Although other evidence was introduced on the question of Licavoli's state of mind, we will assume that the admission of the recorded conversations was material to the outcome of the case, and we thus reach the merits of Licavoli's arguments.

A. Authorization of Surreptitious Entry to Plant the Listening Device

The initial court order authorizing electronic surveillance and the extension order each authorized the F.B.I. to "enter (Licavoli's office) surreptitiously for the purpose of installing, maintaining, and removing" electronic listening devices. Licavoli contends that Title III does not permit surreptitious entry to plant a listening device and that the authorization and extension orders thus are facially invalid. In the alternative, he argues that if surreptitious entry is permitted by Title III, both Title III and the Fourth Amendment require specific court authorization for surreptitious entry, and the authorization order and extension order in this case are overly broad.

Title III is silent on the question of the authority of the courts to authorize break-ins or surreptitious entry for the purpose of installing eavesdropping devices. The question whether the power to authorize surreptitious entry can be implied from the explicit statutory grant of power to authorize the interception of

communications, which sharply divided the circuits, has now been authoritatively answered by a recent decision of the Supreme Court, **Dalia v. United States**, 441 U.S. , 99 S.Ct. 1682, 60 L.Ed. 177 (1979). In **Dalia**, the Court held that Congress intended to confer power upon the courts to authorize covert entries for the purpose of implanting listening devices and that the "Fourth Amendment does not prohibit **per se**" such covert entries. 60 L.Ed. at 186-87.[2] The Court further held that because it is "implicit in bugging authorizations" that covert entry may be necessary for the installation of surveillance equipment, a Title III electronic surveillance order need not include a specific authorization to enter covertly the premises described in the order. 60 L.Ed. at 193.

Under the holding of **Dalia**, the authorizing judge was empowered to authorize covert entry into Licavoli's office; therefore, the authorization and extension orders did not violate either the statute or the Fourth Amendment.

B. Evidentiary Hearing on Reasonableness of Entry

In a supplemental brief filed after the **Dalia** decision, appellant contends that he was entitled to an evidentiary hearing concerning the reasonableness of the surreptitious entry to install the electronic surveillance device, relying upon the statements in **Dalia** that the manner in which a warrant is executed is subject to later judicial review as to reasonableness. 60 L.Ed. at 193. He states that this evidentiary hearing was requested and refused, and that the case should be remanded for such a hearing at this time. In a pretrial motion addressed to the claimed constitutional overbreadth of surveillance orders, he argued that the orders should have specified greater detail and closed with the sentence:

> In the alternative, the defendant contends that at a minimum, he is entitled to an evidentiary hearing to determine if the surreptitious entry in the case at bar was, in fact, carried out with the minimum intrusion possible with the defendant's right of privacy. . . ."

Although the trial court did not grant a separate pretrial or post-trial hearing on the question of reasonableness, the appellant had ample opportunity to inquire into the matter at trial. Special F.B.I. Agent Louis George, who was the agent in charge of the investigation, and who had signed the affidavits supporting the electronic surveillance application, was called to the stand by the Government. He was examined and cross-examined in open court and, at the request of the appellant, was further examined outside the presence of the jury, before the jury heard the tape of the

recorded conversations. The cross-examination revealed that the bugging device was installed at the same time as the telephone tap on March 18th, and was removed on April 30th, at the time a conventional search was conducted on the premises pursuant to a valid search warrant. Mr. George further testified that the microphone was operating only during the two successive twenty-day periods authorized by the court, and that minimization requirements were followed. He testified concerning the location of the device, which was in the first floor front office of the art gallery. The appellant had full opportunity to develop any facts concerning the placement and removal of the electronic device and the reasonableness of the intrusion. The appellant points to no circumstances indicating that the execution of the electronic surveillance was unreasonable. A remand for an evidentiary hearing is not required.

C. Specification of Offenses

The authorization and extension orders authorized the F.B.I. to intercept communications relating to several offenses, including the offense of "receiving, concealing, storing, bartering, selling or disposing of goods, wares, or merchandise of the value of $5,000 or more, which are moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken in violation of Title 18, United States Code, Section 2315." Licavoli contends that the orders did not state with sufficient particularity the offense to which the interceptions should relate, in violation of 18 U.S.C. § 2518 (4)(c) and of the specificity requirements of the Fourth Amendment. He argues that at the time the orders were issued, he was suspected of dealing in stolen diamonds only, and that the orders should have limited interception to communications relating to dealings in illegitimate diamonds. If the orders had described Licavoli's suspected criminal conduct with such particularity, the contents of intercepted communications relating to the stolen painting arguably could not have been legally disclosed absent judicial approval upon separate application to the court. **See** 18 U.S.C. § 2517 (5).

The authorization orders did not violate the specificity requirements of the Fourth Amendment. The Government must show that it has probable cause to believe that a specific crime has been or is being committed before it may be permitted to invade constitutionally-protected areas. **See Berger v. New York**, 388 U.S. 41, 59 (1967). The elements that must be specified in a search

warrant, however, are related only indirectly to the suspected offense:

> The Fourth Amendment requires specification of "the place to be searched, and the persons or things to be seized." In the wiretap context, those requirements are satisfied by identification of the telephone line to be tapped and the particular conversations to be seized.

United States v. Donovan, 429 U.S. 413, 427 n.15 (1977). Although the conversations to be intercepted by electronic surveillance are necessarily identified partly in terms of the suspected offenses to which they will relate, the content of the communications to be intercepted cannot be known in advance, and the authorizing order need not describe every aspect of the criminal acitivity expected to be revealed by the surveillance. "The order must be broad enough to allow interception of any statements concerning a specified pattern of crime." **United States v. Tortorello**, 480 F.2d 764, 780 (2d Cir.), **cert. denied**, 414 U.S. 866 (1973). It was not required in this case that the orders specify the conversations to be seized in the detailed and restrictive manner urged by Licavoli; the reference in the orders to stolen goods generally, rather than stolen diamonds, was sufficient to satisfy the mandates of the Fourth Amendment.

A similar analysis leads to the conclusion that the authorization orders are valid under the provisions of the statute. Title 18 U.S.C. § 2518(4)(c) provides that an order authorizing the interception of communications shall include "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates." At least with respect to the problem of identification of the suspected criminal conduct, the requirements of § 2518(4)(c) are satisfied by the recital in the authorization orders of the elements of the statutory offense to which the communications sought to be intercepted would relate. **See United States v. Cohen**, 530 F.2d 43, 45-46 (5th Cir.), **cert. denied**, 429 U.S. 855 (1976); **United States v. Principie**, 531 F.2d 1132, 1139 (2d Cir. 1976), **cert. denied**, 430 U.S. 905 (1977).

D. Hearing on Minimization

Licavoli moved the district court to suppress the fruits of electronic surveillance on the ground that the surveillance of his office was not properly minimized, in violation of 18 U.S.C. § 2518(5), but he neglected to request an evidentiary hearing on the question of minimization. On appeal, he contends that the court erred in denying his motion to suppress without **sua sponte** ordering

an evidentiary hearing. We disagree.

An evidentiary hearing on a motion to suppress ordinarily is required if "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." **United States v. Ledesma**, 499 F.2d 36, 39 (9th Cir.), **cert. denied**, 419 U.S. 1024 (1974); **accord, United States v. Losing**, 539 F.2d 1174, 1177 (8th Cir. 1976) (applying the **Ledesma** standard to a motion to suppress the fruits of a wiretap). A hearing is not required if the grounds for suppression consist solely of conclusory allegations of illegality. **See id.** at 1178. "The question of whether an evidentiary hearing is appropriate rests on the reasoned discretion of the district court." **United States v. Santora**, F.2d , slip op. at 2571 (9th Cir. July 18, 1979).

Licavoli's motion to suppress alleges failure to minimize only in general and conclusory terms; he makes no specific allegations raising contested issues of fact. The record shows that the court closely supervised the electronic surveillance through the use of periodic interim reports, and that the F.B.I. undertook, in good faith and with adequate success, the minimization of the interception of innocent conversations. Under these circumstances, the district court did not err in denying the motion to suppress without ordering on its own motion a hearing on the question of minimization. The district court did not abuse its discretion in this case. **See Santora**, slip op. at 2571.

E. Hearing on Misrepresentation in Affidavit

On pretrial motions to suppress, Licavoli alleged that an affidavit presented in support of the F.B.I.'s application for an order authorizing electronic surveillance contained misrepresentations material to the issues of probable cause and the necessity for electronic surveillance. The challenged affidavit was prepared by an F.B.I. agent from information given to the F.B.I. by two confidential informants whose identities have remained undisclosed for their protection. Licavoli asserts that he has correctly guessed the identities of the two informants; his allegations of misrepresentation are based on information he has obtained from the two persons who he thinks are the informants. He contends that the district court erred in refusing to grant his request for an evidentiary hearing on his allegations of misrepresentation.

The defendant is entitled to a hearing only upon a substantial preliminary showing that the statements in the affidavits concerning facts material to the finding of probable cause are deliberately false

or made with reckless disregard for the truth. **Franks v. Delaware**, 438 U.S. 154, 164-72 (1978); **United States v. Young Buffalo**, 591 F.2d 506, 509 (9th Cir.), **cert. denied**, 99 S. Ct. 2178 (1979).

The district court conducted an **in camera** hearing to determine whether Licavoli had made a substantial showing of governmental misrepresentation. After interviewing one of the confidential informants and examining the affidavit of the other, the court concluded that no showing of misrepresentation justifying a full evidentiary hearing had been made. Our review of the **in camera** record supports that conclusion. The trial court properly denied Licavoli's request for a hearing.

IV.

Conduct of Trial

A. Admissibility of Expert Appraisal

As part of its proof of the jurisdictional amount of $5,000, the Government introduced into evidence a record of an appraisal of the value of the *Lucretia* prepared by Sam Aranoff, an appraiser retained by Charna Signer and her insurance company. Aranoff valued the *Lucretia* at $10,000, and the insurer adopted the appraisal as the basis for settling Charna Signer's insurance claim arising out of the theft of the *Lucretia*. Over the objection of the defense, the appraisal was admitted into evidence as a business record of the insurance company. Licavoli argues on appeal that the Government failed to establish a proper foundation for the admission of the expert appraisal.

Rule 803(6) of the Federal Rules of Evidence provides an exception to the hearsay rule for records of regularly conducted activity:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph

> includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Licavoli does not assert that the Government failed to establish the elements of a business record specified in Rule 803(6). Rather, he challenges Aranoff's qualifications to give an expert appraisal. Licavoli contends that although Rule 803(6) expressly authorizes the admission of a business record containing opinions, it does not dispense with the general requirement in Fed.R.Evid. 702 that the qualifications of an expert witness be established. Because the Government failed to establish Aranoff's expert qualifications, Licavoli argues that the business record containing Aranoff's expert opinion of the value of the *Lucretia* was inadmissible.

The question raised by Licavoli is one for which there is little helpful precedent. The issue is no longer controlled by the cases cited by the parties that discuss the Commonwealth Fund Act, 28 U.S.C. § 1732(a), which does not expressly allow the admission of a business record containing opinion. In construing Rule 803(6), we bear in mind the statement of purpose and rule of construction set forth in Fed.R.Evid 102:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceeding justly determined.

The focus of the business records exception to the hearsay rule is on the requirements that the record be made in the course of an as a regular practice of a regularly conducted business activity. **See generally** Fed.R.Evid 803(6). Notes of Advisory Committee on Proposed Rules, Note to Paragraph (6). There are circumstantial guarantees of trustworthiness in a record comtemporaneously prepared by one who acts under a business duty of care and accuracy, particularly when the business entity for which the record is made relies on it.

We see no reason to adopt an inflexible rule that every case requires the proponent of a business record containing expert opinion to affirmatively establish the qualifications of the person forming the opinion. Rule 803(6) expressly provides for the exclusion of a business record if the source of information indicates a lack of trustworthiness. That provision allows the trial judge, in the exercise of his or her discretion, to exclude from evidence a record of the opinion of an expert whose qualifications are seriously

challenged. **See** 4 Weinstein's **Evidence** [paragraph] 803(6)(04), at 803-160, [paragraph] 803(6)(05), at 803-167 (1978); **see also** McCormick on Evidence § 307, at 721-22 (2d ed. 1972).

In this case, Licavoli failed to alert the district court to specific facts raising any doubt concerning Aranoff's qualifications as an appraiser. Moreover, the insurer's reliance on Aranoff's appraisal is affirmative evidence of the reliability of the appraisal. It was in the interest of the insurance company to pay no more on Charna Signer's claim than the painting was actually worth; had the insurer doubted Aranoff's qualifications or entertained a belief that the *Lucretia* was worth significantly less than $10,000, it is unlikely that the insurer would have adopted Aranoff's appraisal. The trial judge did not abuse his discretion in admitting the business record into evidence.

B. Evidence of Collateral Misconduct

Licavoli contends that the trial court erred in failing **sua sponte** to exclude from evidence testimony that included references to Licavoli's alleged dealings with stolen diamonds. We find no reversible error.

Licavoli did not object to the testimony at trial; therefore, he is entitled to no relief on appeal unless the admission of the testimony amounts to plain error. Fed.R.Crim.P. 52. We will not reverse for plain error unless it appears necessary to avoid a miscarriage of justice or to preserve the integrity or reputation of the judicial process. **United States v. Eskridge**, 456 F.2d 1202, 1204-05 (9th Cir.), **cert. denied**, 409 U.S. 883 (1972).

The challenged testimony related to Licavoli's alleged criminal "fencing" activities and was directly relevant to the statutory offense with which Licavoli was charged. Such evidence may have been admissible pursuant to Fed.R.Evid. 404(b) as evidence of an ongoing criminal scheme or a pattern of crime. **Cf. United States v. Brashier**, 548 F.2d 1315, 1325-26 (9th Cir. 1976), **cert. denied**, 429 U.S. 1111 (1977). In any event, Licavoli's counsel was able to mitigate the prejudicial effect of the testimony through effective cross examination. Even assuming the testimony was inadmissible under the Rules of Evidence, considering both the probative value and the prejudicial effect of the testimony, the failure of the trial court **sua sponte** to exclude the testimony did not rise to the level of plain error.

C. Waiver of Privilege Against Self-incrimination

Ron Walker testified before the grand jury in this case in a

manner favorable to Licavoli on the issues of the value and the interstate character of the *Lucretia*. At trial, however, Walker invoked his privilege against self-incrimination and refused to testify. Licavoli argues that Walker waived his privilege under the Fifth Amendment when he testified before the grand jury, and that the trial court erroneously allowed Walker to invoke the privilege at trial.

It is settled that a waiver of the Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs. **United States v. Trejo-Zambrano**, 582 F.2d 460, 464 (9th Cir.), **cert. denied**, 99 S.Ct. 618 (1978); **United States v. Cain**, 544 F.2d 1113, 1117 (1st Cir. 1976). Consequently, voluntary testimony before a grand jury does not waive the privilege against self-incrimination at trial. **United States v. Housand**, 550 F.2d 818, 821 n.3 (2nd Cir.), **cert. denied**, 431 U.S. 970 (1977). A contrary conclusion was reached in **Ellis v. United States**, 416 F.2d 791, 800 (D.C. Cir. 1969); however, the **Ellis** court acknowledged that it had chosen to depart from the prevailing rule, and we decline to follow that decision. The trial court correctly ruled that Walker validly asserted his privilege at trial.

Furthermore, we note that Licavoli suffered little prejudice from Walker's refusal to testify. Licavoli was permitted to have Walker's grand jury testimony read to the trial jury and thus was able to present the substance of Walker's expected trial testimony.

D. Denial of Request to Call Witnesses

At trial Licavoli desired to call as witnesses Ron Walker and four members of the Signer family. Outside of the presence of the jury, the trial court determined that each prospective witness, if called, would refuse to testify on the grounds of self-incrimination. The court ruled that Licavoli would not be allowed to call Walker and the Signers as witnesses. Licavoli contends that he should have been allowed to call Walker and the Signers to the stand, in front of the jury, to demonstrate to the jury that he was not reluctant to confront those persons as witnesses.

Licavoli does not contest that each of the Signers could validly invoke the privilege against self-incrimination and, as previously stated, Walker did not waive his privilege to refuse to testify at trial. The prosecutor was under no duty to grant immunity to the prospective witnesses to remove the constitutional obstacle to calling them to the stand. **United States v. Trejo-Zambrano**, 582 F.2d at 464; **United States v. Bautista**, 509 F.2d 675, 677 (9th Cir.), **cert. denied**, 421 U.S. 976 (1975). Consequently, because the trial

court determined that Walker and the Signers would refuse to testify if called, the court correctly ruled that Licavoli could not call them as witnesses for the sole purpose of compelling them to invoke their Fifth Amendment privilege in front of the jury. **See United States v. Espinoza**, 578 F.2d 224, 228 (9th Cir.), **cert. denied**, 99 S.Ct. 151 (1978); **United States v. Roberts**, 503 F.2d 598 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975); **United States v. Beye**, 445 F.2d 1037 (9th Cir. 1971).[3]

E. Interstate Commerce

Approximately two months after the *Lucretia* disappeared from Charna Signer's home in Ohio, the painting surfaced briefly in Los Angeles, California. From Los Angeles, the painting was shipped to Tucson, Arizona, where it was picked up by Arlene Signer, the former daughter-in-law of Charna Signer. The painting remained at Arlene Signer's residence for almost one year before Licavoli obtained possession of it. At trial Licavoli moved the court for a judgment of acquittal on the ground that the Government had failed to show that the *Lucretia* was a part of interstate commerce when Licavoli received it, an essential element of 18 U.S.C. § 2315. Licavoli now challenges the trial court's denial of that motion.

Whether the interstate movement of a stolen article has come to an end generally is a question of fact, to be determined by the jury. **Corey v. United States**, 305 F.2d 232, 236 (9th Cir. 1962), **cert. denied**, 371 U.S. 956 (1963); **Untied States v. Jones**, 564 F.2d 1315, 1317 (9th Cir. 1977). In this case, the trial court properly denied the motion for acquittal when there was relevant evidence from which the jury could reasonably infer that the *Lucretia* was still in interstate commerce when Licavoli obtained possession of it. **See Corey**, 305 F.2d at 237; **United States v. Rojas**, 554 F.2d 938, 943 (9th Cir. 1977).

The jury was not precluded from finding a continuation of interstate movement merely because the *Lucretia* was transferred from the initial recipient in the destination state to Licavoli; the jury could conclude that Licavoli acted as a "fence," and that the transfer was an integral part of an essentially continuous transaction. **See Untied States v. Tobin**, 576 F.2d 687, 693 (5th Cir.) **cert. denied**, 99 S.Ct. 731 (1978); **Corey**, 305 F.2d at 236. The critical question is whether the painting had remained in storage in Arlene Signer's residence for a sufficiently long period of time that the jury could not reasonably conclude that the interstate movement of the painting had not terminated. **Cf. United States v. Thies**, 569 F.2d 1268, 1272 (3d Cir. 1978); **United States v. Tobin**, 576 F.2d at 693.

In determining whether the interstate movement of a stolen article has come to an end, the jury may consider the nature of the article and the manner in which it must be disposed of. **Lee v. United States**, 363 F.2d 469, 475 (8th Cir.), **cert. denied**, 385 U.S. 947 (1966). If the article is difficult to dispose of in normal commercial channels or must be concealed until publicity concerning its theft has subsided, it may retain its interstate character for a substantial period of time after reaching the destination state. **See id.; Tobin**, 576 F.2d at 693; **Pearson v. United States**, 378 F.2d 555, 560 (5th Cir. 1967). Thus, it was held in **Tobin** that the jury could reasonably conclude that stolen statues remained in interstate commerce for two years after their arrival in the destination state, because there was evidence from which the jury could infer that the works of art were easy to identify and had been concealed to facilitate resale. 576 F.2d at 693.

The jury in this case could readily infer that the *Lucretia* was a unique work of art, not easily disposed of in normal commercial channels. Indeed, there was evidence tending to show that the storage of the *Lucretia* in Arlene Signer's residence for almost one year served the combined purposes of concealing the painting until publicity of the theft had subsided and allowing Signer to obtain an appraisal of the painting and to find a suitable dealer who would agree to resell it. The jury could reasonably conclude that the *Lucretia* was a part of interstate commerce when Licavoli received it. The trial court properly denied Licavoli's motion for acquittal.

V.

Conclusion

The judgment of the trial court if affirmed.

FOOTNOTES

[1] Page ii — Evidence introduced at trial tended to show that the *Lucretia* is the sole surviving secular work of the Fifteenth Century artist Dominico Puligo.

[2] Page v — In **Dalia**, the Court defines the term "covert" in the following manner:

> As used here, "covert entry" refers to the physical entry by a law enforcement officer into private premises without the owner's permission or knowledge in order to install bugging equipment. Generally such an entry will require a breaking and entering.

Dalia v. United States, 47 U.S.L.W. 4424 n.2. This definition appears to encompass the kind of entry that the district court in this case intended to authorize when it used the term "surreptitiously."

[3] Page xiii — We note that the district court minimized any prejudice suffered by Licavoli by instructing the jury that the Signers were unavailable to either party and that no adverse inference could be drawn from a party's failure to call the Signers as witnesses. Licavoli did not request that a similar instruction be given concerning Walker's availability as a witness.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS

AFFIDAVIT IN SUPPORT OF APPLICATION

I, LOUIS H. GEORGE, JR., Special Agent, Federal Bureau of Investigation, United States Department of Justice, Tucson, Arizona, being duly sworn, state:

1. I am an investigative or law enforcement officer of the United States within the meaning of Section 2510(7), Title 18, United States Code; that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516, Title 18, United States Code.

2. This affidavit is submitted in support of an application which seeks authorization to intercept wire and oral communications of Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, Ronald J. Walker, and other as yet unknown to and from telephone number (602) 298-4774, subscribed to in the name of Peter Licavoli, Sr., on the premises known as Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, and the office of Peter Licavoli, Sr., located at Grace Ranch, described more particularly as an office, approximately 10 feet by 20 feet, located on the first floor in the center of a two-story corrugated metal building known as the Vesuvio Art Gallery, located in the northeastern section of Grace Ranch, concerning the commission of certain offenses enumerated in Section 2516, Title 18, United States Code; that is, offenses involving the receiving, concealing, storing, bartering, selling, or disposing of property valued at more than $5,000.00, knowing the same to be stolen, converted, or taken by fraud and transported in interstate commerce in violation of Section 2315, Title 18, United States Code, and the interstate transportation of property valued at more than $5,000.00, knowing the same to be stolen, converted, or taken by fraud, in violation of Section 2314, Title 18, United States Code, and a conspiracy to commit these offenses, in violation of Section 371, Title 18, United States Code.

3. I am a Special Agent of the Federal Bureau of Investigation and have been so employed for the past five years and have been assigned to the Phoenix Office, Tucson Resident Agency, of the Federal Bureau of Investigation for the past three years. I have participated in the present investigation of offenses listed in paragraph 2, committed by Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, and Ronald J. Walker, and others as yet unknown, utilizing telephone number (602) 298-4774, subscribed to in the name of Peter Licavoli, Sr., Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, and the office of Peter Licavoli, Sr., at Grace Ranch. As a result of my personal participation in these investigations and reports made to me by other Special Agents of the Federal Bureau of Investigation and investigators of the Arizona Department of Public Safety, I am familiar with the circumstances of the above-described offenses. On the basis of this familiarity, I allege that facts contained in the paragraph below show that:

A. There is probable cause to believe that Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, Ronald J. Walker, and others as yet unknown, have committed and are committing offenses involving the receiving, concealing, storing, bartering, selling, or disposing of property valued at more than $5,000.000, knowing the same to be stolen, converted, or taken by fraud and transported in interstate commerce, in violation of Section 2315, Title 18, United States Code, and the interstate transportation of property valued at more than $5,000.000, knowing the same to be stolen, converted, or taken by fraud, in violation of Section 2314, Title 18, United States Code, and a conspiracy to commit these offenses in violation of Section 371, Title 18, United States Code.

B. There is probable cause to believe that wire and oral communications of Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, Ronald J. Walker, Frank Chew, and others as yet unknown, utilizing telephone number (602) 298-4774, subscribed to in the name of Peter Licavoli, Sr., and located at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, and the office of Peter Licavoli, Sr., located at Grace Ranch, concerning these offenses will be obtained through this interception, authorization for which is applied for herein and in particular, these wire and oral communication will concern:

1) The receipt of information concerning the interstate transportation of stolen property valued at more than $5,000.00;

2) The identity of the individuals involved in the receiving, concealing, storing, bartering, selling, or disposing of stolen

property converted or taken by fraud and transported in interstate commerce;

3) The times when these illegal transactions will occur or have occurred;

4) The nature and extent of the continuing conspiracy and the identity of the co-conspirators.

C. Normal investigative procedures have to date failed to gather the evidence necessary to sustain a prosecution for violation of these offenses and appear reasonably unlikely to succeed if tried.

FACTS AND CIRCUMSTANCES CONCERNING PROBABLE CAUSE

This affidavit incorporates by reference the affidavit of March 18, 1976, which is attached hereto and listed as Exhibit C.

4. Based upon my past experience in investigations involving interstate transportation of stolen property matters and in consultations with other Special Agents who have conducted these types of investigations, I know that interstate transportation of stolen jewelry often involves large quantities of stolen gems that must be disposed of in a surreptitious manner, in an area often distant from the location where the gems were stolen so as to avoid recognition of the gems, arousing the suspicions of legitimate buyers, or the suspicions of law enforcement personnel. I also know, based on the above, that these violations often involve the use of interstate telephonic communications between the thief, the "fence" or middleman, and the eventual purchaser. I know in selling merchandise that is stolen or taken by fraud, that the sale price is far less than that in legitimate outlets.

5. A Confidential Informant, who for the purposes of this affidavit shall be referred to as Confidential Informant Number 1 (and who was also referred to as Confidential Informant Number 1 in the first affidavit of March 18, 1976), has been furnishing criminal intelligence information to the Arizona Department of Public Safety for the past year on 10 separate occasions and has never been proven false. The information previously furnished by this Informant has been corroborated and proven reliable by independent investigation of the Arizona Department of Public Safety. These independent investigations have consisted of contacts with other Confidential Informants, physical surveillances by the Arizona Department of Public Safety, and corroboration through other reliable Informants of the Federal Bureau of Investigation. The information, which in the past has been furnished by this Confidential Informant, has resulted in one arrest by the Arizona

Department of Public Safety, Phoenix, Arizona. The basis of this informant's knowledge in the present stems from conversations he has had with Peter Licavoli, Sr.

On March 30, 1976, Confidential Source Number 1 told Sergent Hugh Halley, Arizona Department of Public Safety, who in turn told me on the same date that the purchasing and selling of over $100,000 worth of jewelry (Transaction Number 1) by Peter Licavoli, Sr., was still taking place; however, due to Licavoli being ill with the flu, the deal has not yet been consummated, but would be completed as soon as Licavoli recovered from his illness.

6. A Confidential Informant, who has been referred to in the original affidavit as Confidential Informant Number 3, has been furnishing information to the Federal Bureau of Investigation on at least 24 occasions during the past two years. The information previously furnished by the Informant has been corroborated and proven reliable by independent investigation by the Federal Bureau of Investigation. This information, which in the past has been furnished by this Confidential Informant, has aided in several investigations conducted by the Federal Bureau of Investigation. The basis for the information furnished is personal contacts he has had with Peter Licavoli, Sr.

Source Number 3 was contacted by me on March 31, 1976, and he advised that, to his knowledge, there had been no change in the original plans to deliver over $100,000 worth of jewelry to be stolen in the future in Phoenix, Arizona, to Peter Licavoli, Sr., at Tucson, Arizona (Transaction Number 3).

7. On March 18, 1976, the Honorable William C. Frey, United States District Judge, Tucson, Arizona, signed Miscellaneous Order Number 364, authorizing Special Agents of the Federal Bureau of Investigation to intercept wire and oral communications of Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, and others unknown, over telephone number 602-298-4774, subscribed to by Peter Licavoli, Sr., at Grace Ranch, and at the office of Vesuvio Art Gallery at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona. As a result of that order, the following conversations were intercepted:

On March 19, 1976, the following phone call was received at Peter Licavoli, Sr.'s office at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, over telephone number 602-298-4774. It appears that Frank Chew is speaking to Martin Fenster.

1514 — Incoming call (Unknown male=UM)
Marty: Hello.
UM: Hi! Marty?

Marty: Yeah.
UM: Yeah, is Pete there?
Marty: No, he's not, but he told me to tell you if you called that he hadn't heard anything.
UM: Oh, ok!
Marty: So. . .nothing yet.
UM: Ok, that's all I wanted to hear. Tell 'im I called and I'm at home, will you please?
Marty: Are you in town?
UM: No, I'm in Phoenix.
Marty: Ok, ok, I'll tell 'im you called.
UM: Ok, tell 'im that the, uh, man called from Florida and I'm, you know, he wanted to know something and what, whatever.
Marty: The man called from Florida?
UM: Yeah.
Marty: Ok.
UM: . . .and, uh, tell 'im to give me a ring here at the house.
Marty: Ok.
UM: Ok.
Marty: Ok.
UM: Good-bye
Marty: Good-bye

On March 20, 1976, at the office of Peter Licavoli, Sr., at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, the following conversation took place between Peter Licavoli, Sr., and Ronald J. Walker (also referred to as Ed), of Associated Appraisers, Tucson, Arizona, as they were apparently looking at photographs of the diamonds:

Ed: Those two look priceless (inaudible; both men talking at once)
Peter Licavoli, Sr. (PL): What the hell. . .they're. . .
Ed: Let me take these two (inaudible; both men talking at once)
Unknown male: (Inaudible)
Ed: Well, I'm, uh (inaudible; mumbling)
PL: The guy wants a hundred twenty five. I think we can get if for a hundred (inaudible due to loud noise from machine). . .money, you know?

Ed: Yeah, oh, let me tell ya. I'm gonna take these two, uh. . . (Inaudible).
Unknown male (UM): (Inaudible). . .yeah, right. So it'll work right now and we'll see about switchin' it later.
PL: Yeah.
Ed or PL: (Inaudible). . .over your house.
UM: Ok, sure, Good 'nough. Thanks for lettin' me in there. 'Preciate that.
PL: Yeah, good luck.
Ed: Ok, now he won't sell just one of 'em, right?
PL: Oh yeah, he probably would sell one if he could.
Ed: (Inaudible)
PL: Actually—sure, you know. . .one of those. . .he has, uh. . .
Ed: (Inaudible)
PL: . . .he asks, uh. . .he asks almost a hundred thousand for one of them.
Ed: Well, you got 75 and 45. Is that his price?
PL: 75 and 45? Might be. . .yeah. . .75 and 45.
Ed: Those his prices?
PL: 75 and 45.
Ed: Hundred and twenty.
PL: 75 and 45.
Ed: Ok, look.
PL: 75 and 45.
Ed: We could probably buy 'em both for a hundred, right?
PL: No.
Ed: Ok, I quoted. . .
PL: I can't get it cheap but I figure they guy (inaudible); both men talking at one time)
Ed: If he's askin' a hundred twenty five total, you gonna buy 'em both for a hundred?
PL: Uh. . .we gotta try and buy 'em for a hundred and make a few dollars, you know. . .
Ed: Now here's what I told this guy. I told him a hundred and sixty on the canary. Now. . .I told 'im a hundred and sixty cause I figure I'll sell it for a hundred and thirty five. Cause he's gonna finagle; everybody's gonna finagle. So I figure a hundred and thirty five, I'm gonna get. . .hundred thirty, hundred thirty five. So then we got maybe thirty plus the white one free. Now I could sell the white one to maybe ten different people...

Now I gotta give this guy. . .that set me up; I gotta give 'im ten.

PL: You gotta give 'im ten?

Ed: Yeah, I gotta give 'im ten. I told 'im (inaudible) (both men talking at one time)

PL: . . .my man, I gotta give 'im somethin', you know.

Ed: Yeah, yeah. . .you gotta give Charlie somethin'.

PL: (Inaudible; both talking at same time). . .take it; my man—I gotta give 'im ten. I can get away with ten or fifteen. I promised 'im fifteen; I can give 'im ten.

Ed: We'll give Charlie about. . .probably five, or somethin'. We gotta give Charlie somethin'.

PL: Huh?

Ed: We gotta give Charlie somethin'.

PL: Yeah, yeah, yeah. . .I'll tell my man. I can. . .I can give 'im ten and we can give Charlie five. I think.

Ed: Let's see here. If I can get this down at a hundred thirty five, we're in damn good shape!

PL: O beautiful! Beautiful!

Ed: So here's what I told the guy. Now Manny's. . .he's s'posed to call Manny Monday because he's been, see, he's been buggin' us now. Manny mentioned it down there, uh, uh. . .a couple weeks ago. Now this guy's called us three times in the last two days so he's supposed to call again Monday. I told Manny I'm gonna get the pictures. You go down 'n see 'im. You tell 'im if the guy really wants it, to tell 'im to come up here (inaudible) day with the money and we'll talk.

PL: (Inaudible; machine noise). . .headache thing. . .

Ed: I don't either. I don't want no headaches either.

PL: (Inaudible) whatever we get we cut it down and whatever we got to take out. . .

Ed: Now the other thing is that if these guys do (inaudible) just don't even mention to 'em and they'll pay cash.

PL: This guy's. . .

Ed: (Inaudible)

PL: Oh, now wait a minute. We have the money; we have the outlet.

Ed: We've got to be careful with this because I think the guy's funny. Somethin', somethin's screwy some place. . .

PL: I would like to know what it is.

Ed: That's why I'm gonna be careful. . .

PL: I get, uh, I get. . .

Ed: . . .and I'm gonna handle it myself.

PL: Well, I. . .you checked it out and you checked it out thoroughly and you wanna be (inaudible; both talking at one time)

Ed: (inaudible). . .I have a feelin'. I don't know. Got a feelin'.

PL: Now Charlie looked at it, and then Ray (phonetic) looked at it, and he's satisfied that it's ok. (Ed talking in background; inaudible)

Ed: . . .I understand that but you know they switch stones a lot.

PL: Oh, yeah, well. . .

Ed: I could give you two diamonds, I can bring you two diamonds and one of them will be a fake and you won't know which one it is. I can get a. . .

PL: H'h'how 'bout Charlie?

Ed: He knows.

PL: He knows?

Ed: Yeah. . .he knows.

PL: Well, that's wrong, if he knows, that's uh, uh. . .the technical institute. . .

Ed: Yeah, I know.

PL: . . .in California. . .

Ed: I used (inaudible) (both talking at once)

PL: . . .costs about four hundred dollars to get. . .

Ed: It don't cost that much!

PL: Yeah. We checked on it. We called.

Ed: Yeah, but I go through it all the time in the trade, see. . . it's a lot cheaper. It's a lot cheaper to the trades. . .

PL: Yeah, yeah, ok.

Ed: Naw, that's all right.

PL: That's the best way to satisfy yourself; satisfy the people.

Ed: See, the one guy is a banker in Nogales in Sonora. He also has three or four businesses. The other guy is from Guadalajara and it's all—his money's all dope money. That's why he's lookin' for this kind of stuff.

PL: I don't give a shit what kind of money he's got. (Both men talking at one time; conversation inaudible)

PL: I don't wanna know.

Ed: I don't either.

PL: As long as he brings the cash. . .

Ed: Right.

PL: . . .we guarantee that the diamond's a hundred percent; put 'em in the bank, and let 'im look at 'em (inaudible) (both men talking at once)

Ed: . . .if he wants diamonds, I'm 'anna deal with 'im right in the bank, the money and the diamonds, and that's it.

PL: That's it. Money's there. He looks at 'em at the bank. The bank. . .it's ok. . .he give you the money. You pay the guy off and we take our own and that's all; because the guy. . .who'll release the diamonds?

Ed: No they ain't gonna release the money until they get the (inaudible). It's all gotta be done together; it's all gotta be done together. (Long pause)

Ed: I know how to handle it. I handled a lot of. . .

On March 20, 1976, in the office of Peter Licavoli, Sr., at Grace Ranch, the following conversation took place between Peter Licavoli, Sr., and Ronald J. Walker: (also referred to as Ed):

Ed: The guy that owns this stone—is he from Oklahoma or is he from Florida?

PL: Florida! He's got an art gallery there. (Inaudible)

Ed: I don't understand why he (inaudible)

PL: Check 'im out, you know. (inaudible)

PL: . . .and uh, there's nothing wrong with art (Long pause)

PL: When he first come over, you know, when he first come over the guy, I thought he was gonna trade paintings for the diamonds. I says fine, what the hell. Diamonds I could sell right away, you know. He come over here; now he wanted cash.

Ed: I can't understand why, you know, he don't take 'em to New York.

PL: Eh. He says there's people (inaudible). . .I can't understand why the hell don't he sell them in New York. . .

Ed: Unless he's got a bad reputation. If he's got a bad reputation. . .

PL: He's a gambler.

Ed: . . .if he's got a bad reputation in New York, the diamond people won't deal with 'im.

PL: Yeah.

Ed: See?

The "man from Florida" referred to above and also referred to in the conversation of March 19, 1976 (page 6 of this affidavit) has been identified as M.H. Maxwell.

On March 22, 1976, the following conversation took place over telephone number 602-298-4774, in Peter Licavoli, Sr.'s office at Grace Ranch between Peter Licavoli, Sr., and Frank Chew:

Frank: Yeah.

Pete: You know.

Frank: But any way, I said that he was available and that I could call him today or tomorrow. . .

Pete: (Talking in background) Yeah.

Frank: . . .that he'd fly in right away.

Pete: Yeah, and uh. . .

Frank: So. . .(inaudible; both talking at once)

Pete: Tell 'im if he could bring a lot of small stuff if he's got it, you know.

Frank: Yeah. No, he said he'd come in right away. He said there is no problem. He said I'll jump on the airplane...

Pete: Ok.

Frank: . . .as soon as you call me.

On March 23, 1976, the following statement was made by Frank Chew in Peter Licavoli's office at Grace Ranch:

No, I'll just go over there cause I gotta get back to the hotel first 'n I don't know which time; I gotta make some long distance calls for Pete.

On March 23, 1976, at Grace Ranch, the following conversation took place between Frank Chew and Peter Licavoli, Sr., who was at home sick, over telephone number 602-298-4774:

1212—Outgoing call

Frank: Hello!

Pete: Yeah.

Frank: How you feelin' today?

Pete: Uh, lousy.

Frank: Lousy? Well you better stay in bed then.

Pete: (mumbling in background while Frank talking)—Sonofabitch.

Pete: Sonofabitch, I don't know what it is. This flu—I gotta watch it you know, I get pneumonia real fast.

Frank: Yeah.

Pete: So I better stay in until I get over it. I haven't heard anything.

Frank: Uh huh. Well he called me last night, you know.

Pete: He did?

Frank: . . .and he told me he was thinking about comin' here and I told him—don't come until, you know, we get the word.

Pete: Oh, no! Don't have 'im come, Jesus Christ!

Frank: No! No! He said he'd you know, he called my house and my wife told 'im I was in Tucson and he said—Geese, I'd better come down there; I thought I'd come down. I said—no, no, don't do that! I said—don't come down here to Tucson.

Pete: Well, uh, please don't tell 'im anything because if you even encourage him, tell 'im that we got this or we got that, then he'll wanna come down, you know.

Frank: Yeah.

Pete: Until we get it, for sure, between you and I—I think that uh, we'll have a sale, you know. . .

Pete: But I don't know when, you know?

Frank: Mmhmm.

Pete: Uh. . .that a Harry call up?

Frank: Uh, yeah. He wanted to talk to you today, but you can talk to 'im tomorrow—it'd be all right.

Pete: Ok.

Frank: Because I have to get with you and talk about some paintings and stuff before you know, uh, before he comes down here.

Pete: Ok. Take care and uh. . .

Frank: Ok, well, uh. . .

Pete: I. . .if anything. . .

Frank: . . .I'll just. . .

Pete: . . .I'll give you a call, and uh, get that, get them tickets and give 'em to Marty. Put 'em in an envelope, will ya?

Frank: Oh, ok.

Pete: . . .and uh, see what you can do on that pipe if you can find any, you know.

Frank: Yeah, right!
(both men talking; inaudible)

Pete: . . .you know.

Frank: Yeah, I'm trying to; well, by brother's got some; I'm tryin' to catch. . .(inaudible) (Pete interrupts)

Pete: Gallagher might have some over there. He might know where's some, you know.

Frank: Yeah, well, I'll give 'im a ring too. . .(inaudible; Pete interrupts)

Pete: . . .and get a hold of him; maybe I can trade him for, uh, give uh painting for some. . .

Frank: Mmhmm.

Pete: . . .uh, pipes. Might be an idea, you know?

Frank: Yeah, well, let me see what I can do then today. So you're gonna come in do you think tomorrow, or what?

Pete: I think so; I was—I'm gonna see the doctor today and. . .

Frank: Uh huh.

Pete: . . .if, if I can get 'im over here, you know.

Frank: Oh.

Pete: I don't wanna get up, you know.

Frank: Ok, well if Mack. . .why don't you give me a ring later on tonight cause Maxwell's gonna call me again. . .

Pete: Ok. You're still in room 166?

Frank: Right.

Pete: Ok, fine.

Frank: Ok then.

Pete: Yeah.

Frank: Right. Oh, hold on.
(Pete hangs up)

Marty: Hello! (hangs up, too)

On March 24, 1976, the following conversation took place in Peter Licavoli, Sr.'s office between Frank Chew and Martin Fenster regarding Peter Licavoli, Sr.'s illness:

Incoming call

Marty: Hello!

Frank: Hi! Marty?

Marty: Yeah.

Frank: How're you today?

Marty: Ok. What's up?

Frank: Oh, not much. How's Pete today?

Marty: Uh, not too good!

Frank: Oh, is he still sick?

Marty: Yeah, he's still sick. He's still gotta stay in bed.

Frank: Uh huh.

Marty: So, uh, I'm just leaving.

Frank: Yeah. Well, would you call 'im and have 'im call me here at the hotel?

Marty: Have 'im call you at the hotel?

Frank: Yeah.

Marty: Ok, I'm gonna see 'im in a little while and see how he is.

Frank: Ok.

Marty: Ok fine!

Frank: Right. Bye.

Marty: Bye.

On March 29, 1976, the following conversation took place at the office of Peter Licavoli, Sr., at Grace Ranch, over telephone 602-298-4774, between Frank Chew and Martin Fenster:

1152 Incoming call
Marty: Hello.
Frank: Hi. What's up?
Marty: Good morning!
Frank: How're you today?
Marty: Ok.
Frank: Uh, is the old man around?
Frank: No, not yet.
Frank: Ok.
Marty: I expect him though. It's kinda windy over here. Are you in town?
Frank: No, no, I'm in Phoenix.
Marty: Blowing like hell. I don't know whether he'll come out or not. Want me to give 'im a call?
Frank: Uh, no. Just, uh, I'm not at home. Have 'im give me a ring at my house tonight. At about 6.
Marty: Huh?
Frank: Have 'im call me at 6 at my house.
Marty: Have 'im call you tomorrow?
Frank: No, today! Tonight! At 6 c'clock.
Marty: Huh? I didn't hear you.
Frank: Tonight at 6 o'clock.
Marty: You want 'im to call you tonight at 6 o'clock. . .
Frank: Right.

On March 30, 1976, in Peter Licavoli, Sr.'s office at Grace Ranch, the following telephone call was intercepted. Someone identifying himself as "Maxwell" calls 602-298-4774, and speaks with Martin Fenster:

Marty: Hello!
Female operator (FO): Hello. Long distance calling for Mr. Peter Licavoli.
Marty: Well, he's not in.
FO: Do you know when he's expected?
Marty: Oh, possibly this afternoon, oh, around 1 o'clock.
FO: Sir, you wanna call back then?
Maxwell: Uh, no, leave word operator. Is there another number he can be reached at (inaudible) reach him and have 'im return the call?
Marty: No, no, there isn't.

FO: And you name sir?
Maxwell: My name is Maxwell.
FO: Ok, will you have 'im call Mr. Maxwell?
Marty: Uh, I wasn't able to get in touch with him yesterday so, uh. . .
FO: Do you have Mr. Maxwell's number, sir?
Marty: I don't have another number for him but I do expect him about 12, 1 o'clock.
FO: Sir, we're trying to leave word on the call. Will you have Mr. Lica. . .Licavoli call Mr. Maxwell?
Marty: Yes, I'll. . .
FO: Area code 904.
Marty: Yeah, I have the number.
FO: Ok, thank you.
Marty: You're welcome.

On March 22, 1976, the following conversation between Frank Chew and Martin Fenster took place in Peter Licavoli's office at Grace Ranch regarding Licavoli's illness.

Frank:
I check in over at the Hilton. I'm 'anna stay at the Hilton tonight. (phone call made)
Frank: He said I got a important meeting going on. That's what he told me. Very important meeting. He said we're talkin' about getting some cement.
Marty: Oh? Yeah! Are you going back or where you going?
Frank: Yeah, I gotta go. . .
Marty: At the Hilton?
Frank: Yeah, I gotta get back. . .I gotta take something back to the hotel and I may make some phone calls.
Marty: (Inaudible)
Frank: Yeah, I told Pete I'd see 'im tomorrow afternoon (or "around noon") since he's not feeling good. . .
Marty: No, no.
Frank: . . .(inaudible) come back tomorrow afternoon.
Marty: He's got the damn flu.
Frank: Yeah.
Marty: Yeah, we don't want him coming around with the flu or we'll catch it.
Frank: Ok.
Marty: And if we do, we'll get it.
Frank: Huh?
Marty: And if they do. . .
Frank: Yeah, that what it is. Ok, I'll see you later.

Marty: Yeah. . .how much did you say you wanted for that, uh, that shellac?

On March 25, 1976, in Peter Licavoli, Sr.'s office at Grace Ranch, the following conversation between Frank Chew and unidentified male took place about Peter Licavoli, Sr.'s illness:

Frank: Will you let me call—I'll make; I'm 'anna make one collect call. I gotta call the, uh. . .

Unknown male (UM): Ok!

Frank: Dr. Helvig (phonetic) in Phoenix. (Pause) How bad is Pete? (inaudible) every day he calls me every day at the hotel and tells me he thinks he's gonna come in the next day and the next day.

UM: I couldn't tell ya. To tell you the truth, I've never seen 'im. When I was workin' all day yesterday, I didn't even see 'im.

Frank: Well that's a shame he's sick.

On March 25, 1976, in Peter Licavoli, Sr.'s office at Grace Ranch, the following telephone call was made from telephone number 602-298-4774, to the residence of Peter Licavoli, Sr.:

Female: Hello.
Marty: Hello.
Female: Hello.
Marty: How're you?
Female: Ok, Marty. How you been?
Marty: Tired!
Female: (laughs)
Marty: I just got in. We've been working on that fence all day.
Female: Oh! Yeah?
Marty: How's Pete feeling?
Female: Oh, so, so, you know. He's still has that cold. Uh, you wanna talk to him?
Marty: Yeah, please.
Female: Just a minute.
Female: (talking in background) Pete?
Pete: Hello?
Marty: Hello!
Pete: Yeah.

Marty: How do you feel?
Pete: Yeah. Hello? Hello!
Marty: Yeah.
Pete: Yeah.

On March 30, 1976, in Peter Licavoli, Sr.'s office at Grace Ranch, the following conversation took place about Peter Licavoli, Sr.s' illness:

Marty: Pete won't be down today.
Dante: He's not coming down today, huh?
Marty: Not feeling well.
Dante: He's still got the flu, huh?

On March 20, 1976, in Peter Licavoli, Sr.'s office at Grace Ranch, the following conversation took place between Peter Licavoli, Sr., and Ronald J. Walker:

Pete: (Inaudible) I had some bonds the other day—it wasn't any good, it was all, uh, it was, uh Parks Manufacturing Company as a matter of fact (inaudible due to machine noise). I thought maybe you could do something with 'em, you know. Say, look, uh. . .
Ed: (inaudible) can't do nothing with 'em. . .(inaudible)
Pete: You know (inaudible). . .I had a hundred thousand dollars worth.
Ed: I got too many good connections to fuck around with something that's not any good.
Pete: Yeah, well, you know, I, uh, don't want; I don't want you to get fucked up in this as much as I wanna get, you know, screwed up because, you know, it's not worth it..
Ed: Well, I'm. . .
Pete: We can, we can do some business; do it on up and up; we'd wind up, you don't know. . .
Ed: Tucson. . .
Pete: You know I'm right.
Ed: You know Tucson's not like Chicago or New York or Detroit.
Pete: Naw!
Ed: Tucson is still a little bitty (inaudible) town.
Pete: Yeah, well, uh. . .
Ed: (Inaudible)
Pete: Just like in Phoenix. In Phoenix they got a lot of clip artists over there and we don't wanna be the same thing.

Based on the foregoing conversations, the information contained in the affidavit of March 18, 1976, and the information supplied by Confidential Informants in the present affidavit, it is my belief that the wire communications intercepted over telephone number 602-298-4774, and oral communications intercepted in Peter Licavoli, Sr.'s office at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, on March 19, 20, 23, 24, 29, and 30, 1976, reveal that meetings regarding the illegal transaction referred to previously are taking place in Peter Licavoli's office at Grace Ranch and that telephone number 602-298-4774 is being used in these transactions.

The intercepted conversations also reveal that Peter Licavoli, Sr., M. H. Maxwell, Ronald J. Walker, and others yet unknown are still in the process of completing a deal on the purchase and sale of jewelry worth over $100,000 (Transaction Number 1). The intercepted conversations reveal that Peter Licavoli, Sr., and M.H. Maxwell are still communicating. Maxwell called Peter Licavoli, Sr.'s office as late as March 30, 1976. The intercepted oral communications of March 20, 1976, reveal that Licavoli plans to obtain money, referred to as "dope money" from Guadalajara, Mexico, to purchase the jewelry from M.H. Maxwell. The intercepted communications reveal that the individuals in Mexico have already been contacted and that the transaction is being delayed due to Peter Licavoli, Sr., being ill with the flu and remaining at home most of the time between March 21, 1976, and March 31, 1976.

On April 5, 1976, at 12:06 p.m., a conversation took place in Peter Licavoli, Sr.'s office at Grace Ranch, wherein Peter Licavoli, Sr., advised a caller that he was feeling better and would be in his office every day.

In the above intercepted oral conversations on March 20, 1976, Peter Licavoli, Sr., and an individual identified as Ronald J. Walter (also referred to as Ed) discussed the transaction of purchasing the jewelry from Florida, and that it was still in progress and would take place in the near future. The above intercepted conversations revealed that M.H. Maxwell continues to call Peter Licavoli, Sr., over telephone number 602-298-4774. Licavoli made it clear that he felt they still had a deal; however, he wanted to make sure everything was set before Maxwell brings the jewelry to Tucson from Florida. In the above intercepted conversations, Licavoli also revealed the possibility of Maxwell bringing some more smaller jewelry (Transaction Number 2) along with the jewelry referred to as Transaction Number 1.

Intercepted wire and oral communications on March 22, 25, and

30, 1976, revealed that Peter Licavoli, Sr., has been ill with the flu and has been unable to complete the necessary arrangements to conclude the above mentioned transactions.

The above intercepted oral communications on March 20, 1976, revealed that Peter Licavoli, Sr., has some "no good bonds" he is attempting to sell. It is my belief that as soon as Peter Licavoli, Sr., recovers from the flu, he will attempt to complete the illegal transactions described in the above conversations during the next several weeks.

NEED FOR INTERCEPTION

8. Since interception of wire and oral communications, it has been possible to identify several of the individuals involved in the illegal transactions taking place. The interceptions have also revealed that "dope money" is to be used by Peter Licavoli, Sr., to purchase the jewelry (Transaction Number 1). It is felt that continued interception would further reveal the identities of individuals yet unknown, and their part in the illegal transactions. It is my belief that the activity being electronically surveilled is a continuing criminal conspiracy and that further interception would provide the necessary evidence to successfully conclude this investigation.

Source Number 1 has told Sergeant Hugh Halley, Arizona Department of Public Safety, on March 31, 1976, who in turn told me on the same date that Source Number 1 has stated that he still would not testify publicly about the matter contained in this affidavit. Confidential Sources 2 and 3 have told me that they also would decline to testify. The three Confidential Informants have stated that they fear for their safety and the safety of their families if it were to become known to Licavoli that they have given information about him. They have furnished the above information in strictest confidence. In addition, if they testified to information contained in this affidavit, they would have no further access to information concerning violations of Federal law which would deter future investigations of the Federal Bureau of Investigation in this area.

The Informants in this matter still refuse to wear a tape recorder secreted on their person.

Surveillances of Peter Licavoli, Sr., have been conducted since the beginning of the interception of wire and oral communications on March 18, 1976, by Special Agents of the Federal Bureau of Investigation. These surveillances reveal that Peter Licavoli, Sr., has remained at his residence, 8906 Calle Pasto, most of the period

between March 21, 1976, and March 31, 1976. These surveillances have provided information on Licavoli and his associates' activities; however, due to the location of Licavoli's office on Grace Ranch and the complexity of the transactions and the individuals involved, the surveillances alone are not capable of establishing the progress nor the conclusion of the illegal transactions.

Telephone toll records of Associated Appraisers, 2627 East Broadway, Tucson, Arizona, have been subpoenaed by Federal Grand Jury, Tucson, Arizona. These records have been examined, but no pattern or investigative leads have been developed therefrom.

On March 26, 1976, at Tucson, Arizona, I contacted Special Agent Tom Waddill, Drug Enforcement Administration, Tucson, Arizona, in an attempt to identify the dope dealer from Guadalajara, Mexico, and the banker from Nogales Sonora, Mexico, referred to in the above conversations. Special Agent Tom Waddill was not able to identify these individuals at this time, but indicated he would check with his sources and other Special Agents of the Drug Enforcement Administration in an attempt to do so. To date, he has been unable to assist in the identification. Efforts to identify "Harry and his people," "Charlie," and "Ray" by the Federal Bureau of Investigation have been unsuccessful.

For several years reliable Informants have attempted to gain the confidence of Licavoli. An attempt to introduce an undercover agent to Licavoli through a Confidential Informant has been tried in the past, but has failed.

Since the interception of communications commenced, the telephone toll records of Peter Licavoli, Sr., (602) 886-6598, have been subpoenaed by a Federal Grand Jury in Tucson, Arizona. When studied, these records reveal that someone used that telephone to call Detroit, Michigan, various locations in Southern California, Las Vegas, Florida, and Ohio. A check of the subscriber information available to date for the numbers dialed did not reveal the identifies of anyone known to be involved or thought to be involved in these transactions.

Since the beginning of the interception of communications, I have discussed with other Special Agents of the Federal Bureau of Investigation the possiblity of interviewing Licavoli, Fenster, Maxwell, or Walker in an effort to gain more information about these transactions. Even if one of these individuals would consent to an interview and speak with me freely, however, my attention to them and these transaction would almost certainly alter them to this investigation.

Since the commencement of the interception of wire and oral communications on March 19, 1976, and more has been learned about these transactions, I have discussed with other Special Agents of the Federal Bureau of Investigation the possibility of attempting to continuously surveill Grace Ranch in an effort to determine when the meetings regarding the sale of the diamonds, referred to above, would take place. If it could be determined that the principals, or the stolen gems, or the purchase money were present, the possibility of obtaining a search warrant was contemplated.

As previously discussed, however, the identities and physical characteristics of some of the principals, "Harry and his people," the Sonoran banker, and the Guadalajara dope dealer are unknown. Only a physical description of Maxwell is currently known. Without a more complete discription, it would be almost impossible to determine the identity of those entering the ranch.

It has been my experience and the experience of other Special Agents of the Federal Bureau of Investigation that individuals dealing in valuable stolen goods will attempt to secret their activities and limit their contacts to individuals whom they have come to know and trust. Such a tightly knit organization would greatly reduce the possibilities of detection and prosecution. Conducting their activities through the privacy of the telephone and/or a location such as Grace Ranch would assist in avoiding detection and arousing the suspicion of law enforcement personnel.

On several occasions I have consulted Kevin F. O'Malley, Special Attorney, Organized Crime and Racketeering Section, United States Department of Justice, Los Angeles, California, and discussed the possibility of initiating a Federal Grand Jury investigation into the illegal activities of Licavoli and his associates. Special Attorney O'Malley told me that in his opinion the prospects for a successful Grand Jury investigation at this time were still minimal. He further told me that his opinion was based upon the following facts:

a. Other than the Confidential Informants referred to herein, the only witnesses who could provide evidence to the Grand Jury pertaining to these illegal activities are the subjects of the investigation themselves. In view of the fact that subjects face criminal prosecution, and could validly assert their rights under the Fifth Amendment to the United States Constitution, it is not likely that they would voluntarily testify.

b. Sufficient facts are not now available to make an intelligent determination as to whether or not any of those subjects

involved in this investigation should be compelled to testify through a grant of immunity. The exact roles of various individuals and the scope of their overall knowledge of this activity is simply not known.

c. Even if the Assistant Attorney General were to authorize an application to the District Court for a grant of use of immunity, sufficient facts are not available to measure the cooperation of the witnesses or the truthfulness of their compelled testimony.

If an order to compel testimony of the Informants referred to herein were obtained, their fear of Licavoli could cause them to face contempt charges rather than publicly relate the information that they have given to date. If, after they had given information in strictest confidence, they were compelled to reveal their identities and testify publicly, few people having valuable information, but who out of fear do not wish their identities revealed, would approach the Federal Bureau of Investigation and assist in its investigations.

Further, it is my belief that if individuals were called before the Federal Grand Jury and questioned about this cooperation, their activities and associates, the subjects of the investigation, would immediately change their methods of operation.

My experience and experiences of other Special Agents of the Federal Bureau of Investigation has shown that raids and searches of establishments have not in the past always resulted in gathering enough physical or other evidence to prove all elements of offenses concerning interstate transportation of stolen property. From my experience and the experiences of other Special Agents who have conducted investigations concerning interstate transportation of stolen property, I have found that these individuals frequently do not make or retain records of their transactions. If such records are maintained, they have found through past searches that generally, these records have not been sufficient to establish a. the involvement of all co-conspirators in the offenses; b. the extent of the operation; c. the origin and destination of the property; and d. the methods which are being used to dispose of the stolen property. Even assuming that a conventional search warrant would result in the seizure of the jewelry described above, the gems, without corroborative testimony concerning the location of their origin, the method in which they were obtained, and the knowledge of the fact they are stolen would be insufficient to sustain a prosecution for the above offenses.

On March 18, 1976, the Honorable William C. Frey, United States District Court Judge, Tucson, Arizona, signed an order

authorizing Special Agents of the Federal Bureau of Investigation to intercept wire communications of Peter Licavoli, Sr., M. H. Maxwell, and Martin Fenster, and others yet unknown, in the office of Peter Licavoli, Sr., at Grace Ranch, 8915 East Wrightstown Road, Tucson, Arizona, described as approximately 20 feet by 10 feet, located on the first floor in the center of a two-story corrugated metal building known as the Vesuvio Art Gallery, located in the northeastern section of Grace Ranch.

The activity to be electronically covered is believed to represent a continuing criminal conspiracy. It is further believed that the evidence sought will be obtained on a continuing basis for several days succeeding the first receipt of the particular communications that are the object of this request for interception. Wherefore because of the existence of facts and underlying circumstances of the continuing investigation detailed above, I submit that probable cause exists to permit the issuance of an order to intercept wire communications and oral communications that will not terminate on the first interception that reveals the manner in which Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, Ronald J. Walker and others as yet unknown, conduct their illegal activities, but continues until such interception reveals the identity of confederates of Peter Licavoli, Sr., M.H. Maxwell, Martin Fenster, and Ronald J. Walker, and others as yet unknown, their method of operation and the nature of the conspiracy involved therein, or for a total period of 20 days from the date of this order, whichever is earlier.

Tucson, Arizona

Subscribed and sworn before me this _____ day of _____, 1976, at Tucson, Arizona.

UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1164

In the Supreme Court of the United States

OCTOBER TERM, 1979

PETER LICAVOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xv) is reported at 604 F. 2d 613.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1979. A petition for rehearing was denied on November 28, 1979, and the petition for a writ of certiorari was filed on December 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to hold a separate evidentiary hearing on the reasonableness of a surreptitious entry into petitioner's office to install court-authorized electronic surveillance devices.

2. Whether the trial court erred in failing to hold a hearing on the adequacy of minimization of the electronic surveillance in this case.

3. Whether the trial court erred in failing to hold an evidentiary hearing to determine whether there were significant misrepresentations in an affidavit supporting the government's motion for an electronic surveillance order.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of receiving stolen property moving in interstate commerce having a value in excess of $5,000, in violation of 18 U.S.C. 2315. He was sentenced to 18 months' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. i-xv).

The evidence showed that in April 1976 petitioner attempted to sell a stolen painting, the *Lucretia*, to an undercover FBI agent (Pet. App. ii). After the agent made a $500 down payment, a search warrant was issued and federal agents seized the *Lucretia* from petitioner's art gallery (*ibid.*).

Included in the prosecution's evidence were several conversations recorded by means of electronic listening devices installed by FBI agents in petitioner's office and on his office telephone (Pet. App. i-ii). The court order authorizing this electronic surveillance was based on a finding of probable cause to believe that petitioner was dealing in stolen diamonds (*ibid.*).

ARGUMENT

1. Relying on this Court's statement in *Dalia* v. *United States*, 441 U.S. 238, 258 (1979), that the manner in which a warrant is executed is subject to later judicial review, petitioner contends (Pet. 4-7) that the district court erred in failing to hold an evidentiary hearing on the reasonableness of the surreptitious entry into his office to install the electronic surveillance device. In the circumstances of this case, petitioner's claim is unpersuasive.

Although the trial court did not grant a separate pretrial or post-trial hearing, petitioner had ample opportunity to inquire into the matter. Agent George, the FBI special agent in charge of the investigation, was a witness at the trial and was also examined outside the presence of the jury before the tape recordings made during the surveillance were played. At this time, petitioner had the opportunity to develop any facts concerning the placement and removal of the electronic device and the reasonableness of the intrusion. Petitioner failed to use this opportunity, and, as the court below observed, he "points to no circumstances indicating that the execution of the electronic surveillance was unreasonable" (Pet. App. vi).[1] Nothing in this Court's

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[1]There is no substance to petitioner's assertion (Pet. 5) that he could not cross-examine Agent George concerning the installation and removal of the device, because that inquiry would have exceeded the scope of the direct examination. George had testified on direct that a microphone was placed "in the bottom floor office of the Vesuvio Art Gallery located on the Grace Ranch, Tucson, Arizona" (Tr. 230). Indeed, petitioner brought out on cross-examination the dates on which the microphone was installed and removed (Tr. 238). An objection was sustained to petitioner's inquiry about which FBI agent installed the microphone (Tr. 239), but not to the inquiry about where, physically, it was installed (*ibid.*). Petitioner refers (Pet. 5) to the trial court's ruling limiting the scope of cross-examination to the

statement in *Dalia* suggests that the post-surveillance judicial review available to petitioner was inadequate. *Dalia* does not require district courts to grant a hearing in every case involving surreptitious entry, in the absence of any showing at all that unreasonably intrusive techniques were employed.[2] No court of appeals has found such a requirement in *Dalia*, and there is accordingly no issue here requiring this Court's review at this time.

2. Petitioner also asserts (Pet. 7-10) that the district court erred in failing to conduct an evidentiary hearing on the issue of the government's compliance with the minimization requirements of 18 U.S.C. 2518(5).[3] But while petitioner moved prior to trial to suppress the fruits of the electronic surveillance because of an alleged failure to minimize the interception, he did not request an evidentiary hearing on the question or identify any

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scope of direct examination (Tr. 246-248). That ruling was required because of petitioner's efforts to inquire about other items seized when the search warrant was executed, the diamond transactions, the time when the investigation of petitioner started, and the investigations relating to the theft of the picture (Tr. 244-251). The surreptitious entry question was not considered during the conference outside the presence of the jury.

[2]In *Dalia* the defendant received an evidentiary hearing after trial, so the question of what circumstances mandate such a hearing was not before the Court.

[3]This statute provides that "[e]very order and extension thereof shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." The instant orders contained such provisions, and the agents followed the standard minimization procedure (Tr. 237-239).

improperly overheard conversations.[4] A hearing is not required if the grounds for suppression consist solely of conclusory allegations of illegality. See *United States* v. *Losing*, 539 F. 2d 1174, 1178 (8th Cir. 1976).[5]

Agent George testified (Tr. 237, 238-239):

> We initiated the wiretap at a certain time in the morning. We closed it out at a certain time in the evening. As we proceeded with the surveillance each day, we narrowed it down smaller and smaller. And when we ended, we only listened to the conversations

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[4]Petitioner contends (Pet. 7-9) that he was unable to identify improperly overheard conversations because he did not have access to the information necessary to determine what conversations were overheard. But he was informed of the time during which the order was in effect (Tr. 157, 237), and if he thought that any particular kinds of conversations conducted during that time should not have been overheard, he could have identified them.

[5]Contrary to petitioner's suggestion (Pet. 8), the holding in this case is not in conflict with *United States* v. *Losing, supra*. The defendant in *Losing* requested a pretrial hearing on the minimization question. 539 F. 2d at 1177-1178. Moreover, the record before the appellate court in *Losing* did not indicate how closely the district court supervised the interception (*id.* at 1180). The courts of appeals have agreed with the court below that supervision through periodic interim reports, such as those made to the issuing judge in this case, is a significant factor in determining whether the minimization requirement has been met. See, *e.g.*, *United States* v. *Armocida*, 515 F. 2d 29, 44-45 (3d Cir. 1975); *United States* v. *Quintana*, 508 F. 2d 867 (7th Cir. 1975); *United States* v. *Bynum*, 485 F. 2d 490, 501 (2d Cir. 1973).

Petitioner also suggests a conflict between the instant case and the decisions in *United States* v. *Armocida, supra; United States* v. *Quintana, supra;* and *United States* v. *Rizzo*, 491 F. 2d 215 (2d Cir. 1974). None of those decisions dealt with the question presented here—the necessity for a minimization hearing. Rather, in each of the cases the court of appeals considered the merits of a minimization claim and found that the minimization requirement had been met.

> which were pertinent to our case. Whenever there was a personal conversation that we felt was not pertinent, we turned the recorder off.
>
> * * * * *
>
> [W]e applied through the Court to obtain permission to [install a microphone]. * * * We had to maintain certain hours, which we, as I said, before, cut down to minimize and only listened to pertinent conversations.

The record is thus adequate to support the conclusion that the statutory minimization requirements were not violated.

3. Petitioner's final contention is that the trial court erred in failing to hold an evidentiary hearing on alleged misrepresentations in the warrant affidavit involving disclosure of various confidential informants (Pet. 12-16). The court of appeals correctly rejected this claim (Pet. App. viii-ix).

Prior to trial, petitioner moved to suppress the intercepted conversations on the ground that an affidavit filed in support of the application for the electronic surveillance order falsely represented that he was dealing in stolen diamonds (Pet. App. viii). The challenged affidavit was prepared by an FBI agent from information given to the FBI by two confidential informants whose identities have remained undisclosed for their protection (*ibid.*). Petitioner's allegations of misrepresentation were based on information he obtained from two persons he believes to be the informants (*ibid.*).

This Court's decision in *Franks* v. *Delaware*, 438 U.S. 154 (1978), established that a defendant is entitled to a hearing only upon a substantial preliminary showing that statements in the affidavits concerning facts material to the finding of probable cause are deliberately false or made with reckless disregard for the truth. In this case the trial court conducted an in camera hearing to determine whether petitioner's evidence amounted to such a substantial preliminary showing of misrepresentation. After interviewing one of the confidential informants at the in camera hearing and examining the affidavit of the other, the district court concluded that petitioner had not met his burden under *Franks*.[6] The court of appeals reviewed the record of the in camera proceeding and agreed with that conclusion. This essentially factual question, resolved against petitioner by the two courts below, does not warrant further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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[6]Making this inquiry of the informants in an in camera proceeding was proper. *Franks* does not require that an informant's identity be disclosed whenever a defendant makes a substantial preliminary showing of falsity in an affidavit in support of a search warrant. Rather, the Court explicitly reserved the question whether such disclosure would be required under any circumstances. 438 U.S. at 170. Even when the issue is guilt or innocence at trial—not the existence of probable cause—the court may properly conduct an in camera examination to evaluate the issue prior to ordering disclosure of an informant's identity. See *United States* v. *Anderson*, 509 F. 2d 724, 727, 730 (9th Cir. 1974), cert. denied, 420 U.S. 910 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980

DOJ-1980-04